United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1910.

723

No. 2139.

S. DANA LINCOLN, TRADING AS NATIONAL MORTAR COMPANY, A CORPORATION, APPELLANT,

vs.

THE NATIONAL METROPOLITAN BANK, INTERVENOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED MARCH 22, 1910.

e. f.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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S. DANA LINCOLN, TRADING AS NATIONAL MORTAR COMPANY, A CORPORATION, APPELLANT,

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 23, 1910.

In the Court of Appeals of the District of Columbia.

No. 2139.

S. DANA LINCOLN, Trading as National Mortar Company, a Corporation, Appellant,
vs.
THE NATIONAL METROPOLITAN BANK, Intervenor.

a Supreme Court of the District of Columbia.

At Law. No. 48775.

S. DANA LINCOLN, Trading as National Mortar Company, and The National Metropolitan Bank, Intervening Petitioner, Complainants,
vs.
THE SOUTHERN CONSTRUCTION COMPANY, a Corporation, Defendant

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed Sep. 11, 1906.

In the Supreme Court of the District of Columbia.

Law. No. 48775.

S. DANA LINCOLN, Trading as National Mortar Company, Plaintiff,
v.
THE SOUTHERN CONSTRUCTION COMPANY, a Corporation, Defendant.

The plaintiff, S. Dana Lincoln, trading as the National Mortar Company, sues the defendant, the Southern Construction Company, a corporation created under the laws of the state of Maryland, for money payable by the defendant to the plaintiff, for goods sold and

delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at its request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff to the defendant at its request; and for money received by the defendant for the plaintiff's use; and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims $968.57 with interest from the second day of June, A. D. 1906, according to the particulars of demand hereto annexed, besides costs of this suit.

PERCIVAL M. BROWN,
Att'y for Plaintiff.

2 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays occurring after the day of the service hereof; otherwise judgment.

PERCIVAL M. BROWN,
Att'y for Plaintiff.

Affidavit.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

I, S. Dana Lincoln, do depose and on my oath say: that I am the plaintiff in the above entitled action, wherein the Southern Construction Company, a corporation created in Maryland is defendant; that said defendant is indebted to said plaintiff in the sum of nine hundred and sixty-eight and 57/100 Dollars ($968.57) with interest from the second day of June, 1906, for cement and lime according to the particulars of demand hereto annexed, which said particulars of demand are just, true and correct and are made a part of this affidavit; that the said cement and lime set forth in said particulars of demand were all actually delivered by the said plaintiff to the said defendant at its request and upon its promise to pay the said plaintiff for the same the prices charged in said particulars of demand, which said prices were the current market prices at the time when said cement and lime were delivered to the said defendant
3 by the said plaintiff, and said prices were and are fair and reasonable; that the said defendant has failed to pay the said plaintiff for said cement and lime or for any part thereof, except as credited in said particulars of demand, although often requested by the said plaintiff so to do; that said plaintiff on account of the cause of action herein stated has a just right to recover from the said defendant the sum of nine hundred and sixty-eight and 57/100 Dollars ($968.57) with interest from second day of June, 1906, as claimed in the affidavit of the plaintiff filed herein, exclusive of all set-offs and just grounds of defence; that said defendant is a foreign corporation, created under the laws of the State of Maryland, and is a non-resident of the District of Columbia.

S. DANA LINCOLN.

Subscribed and sworn to before me this first day of September, A. D. 1906.

[SEAL.] ANNA M. ANDERSON,
Notary Public.

4 DISTRICT OF COLUMBIA, *ss:*

I, David C. Chesterman, do depose and on my oath say: that I am employed as manager of said National Mortar Company by S. Dana Lincoln, the plaintiff in the above entitled action, wherein The Southern Construction Company is defendant and I have personal knowledge of plaintiff's claim in this suit; that said defendant, a corporation, is indebted to said plaintiff in the sum of Nine hundred and sixty-eight and 57/100 Dollars ($968.57) with interest from the second day of June, 1906, for cement and lime according to the particulars of demand hereto annexed, which said particulars of demand are just, true and correct and are made a part of this affidavit; that the said cement and lime set forth in said particulars of demand were all actually delivered by the said plaintiff to the said defendant at its request and upon its promise to pay the said plaintiff for the same the prices charged in said particulars of demand, which said prices were the current market prices at the time when said cement and lime were delivered to the said defendant by the said plaintiff, and said prices were and are fair and reasonable; that the said defendant has failed to pay the said plaintiff for said cement and lime or for any part thereof, except as credited in said particulars of demand, although often requested by the said plaintiff so to do; that said plaintiff on account of the cause of action herein stated has a just right to recover from the said defendant the sum of

5 Nine hundred and sixty-eight and 57/100 Dollars ($968.57) with interest from the second day of June, 1906, as claimed in the affidavit of the plaintiff filed herein, exclusive of all set-offs and just grounds of defence; that said defendant is a foreign corporation, created under the laws of the State of Maryland, and is a non-resident of the District of Columbia.

DAVID C. CHESTERMAN.

Subscribed and sworn to before — this first day of September, A. D. 1906.

[SEAL.] ANNA M. ANDERSON,
Notary Public.

6 *Bill of Particulars.*

National Mortar Co. Building Material. Wholesale and Retail.
Office Room 9, Ralston Building, 612 F Street N. W.

WASHINGTON, D. C., *Aug.* 31, 1906.

Sold to Southern Construction Co., 1334 Corcoran St.

1906.

M'ch 16. 3¾ Bals. Dragon..... ..... 7 50

7 50

WASHINGTON, D. C., *Aug.* 31*st*, 1906.

Sold to Southern Construction Co., Freedman's Hospital.

1906.				
May 29.	To 135 Bals. Dragon Cement, 2.10			283 50

WASHINGTON, D. C., *Aug.* 31, 1906.

Sold to Southern Construction Co., 15th, F & G.

1906.				
May 28.	To Am't forw'd			736 40
29.	" 12½ Bals., 15th & F			25 00
31.	" 12½ "			25 00
June 2.	" 10 " Lime			6 00
				792 40
7	Am't brought f'w'd			792 40

CR.

Feb'y 26.	By 107 Sacks		7.42	
M'ch 5.	" 169 "		12.27	
9.	" 188 "		13.63	
22.	298 "		21.28	
29.	160 "		12.27	
May 31.	274 "		19.48	
Aug. 17.	"		28.48	114 83
			114.83	677 57

WASHINGTON, *Aug.* 31, 1906.

Sold to Southern Construction Co., 15th F & G.

1906.				
Feb'y 16.	To 3 Bals. Lime in wood 70			2 10
	" 10 " Dragon Cement			20 00
19.	" 10 " Dragon Cement			20 00
20.	" 4 " Lime in wood			2 80
21.	" 10 " Dragon Cement			20 00
24.	" 4 " Lime in wood			2 80
	" 20 " Dragon			40 00
26.	" 25 " Dragon			50 00
M'ch 4.	" 4 " Lime in wood 70			2 80
2.	" 12½ " Dragon			25 00
5.	" 6 " Lime in wood 70			4 20
	" 25 " Dragon			50 00
6.	" 12½ " Dragon			25 00
8.	" 25 " Dragon			50 00
	" 6 " Lime in wood 70			4 20
9.	" 12½ " Dragon			25 00
10.	" 12½ " Dragon			25 00
12.	" 12½ " Dragon			25 00

	17.	To 12½	Bals.	Dragon	25 00
		" 6	"	Lime in wood	4 20
	22.	" 25	"	Dragon	50 00
		" 12½	"	Dragon	25 00
		" 6	"	Lime in wood	4 20
	29.	" 6	"	Lime in wood	4 20
		" 25	"	Dragon	50 00
M'ch	3.	" 4	"	Lime in wood	2 80
April	4.	" 6¼	"	Dragon	12 50
May	15.	" 6	Bals.	Lime 60	3 60
		" 12½	"	Dragon	25 00
	17.	" 12½	"	Dragon	25 00
	23.	" 10	"	Lime	6 00
	23.	" 15	"	Dragon	30 00
	25.	" 25	"	Dragon	50 00
	28.	" 12½	"	Dragon	25 00
					736 40

8 *Memoranda.*

Sept. 1, 1906.—Attachment bond approved & filed, and summons issued on the above date, was returned Oct. 1, 1906, "Deft. not to be found."

Feb'y 6, 1907.—Writ of Attachment issued and returned: "Attached credits, property of the defendant, in the hands of Thompson-Starrett Company, Garnishee," &c.

Answer of Thompson-Starrett Company.

Filed Mar. 12, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 48775.

S. DANA LINCOLN, Trading as the National Mortar Company,
Plaintiff,
vs.
THE SOUTHERN CONSTRUCTION COMPANY, a Corporation.

The Thompson-Starrett Company for answer to the interrogatories in the attachment proceedings hereinbefore issued and served on it, says:

1-2. On or about the 12th day of December, in the year 1905, said respondent contracted and agreed with the defendant, the Southern Construction Company that said defendant should furnish and erect all of the fire proofing required to completely finish the bank building
9 for the National Metropolitan Citizens Bank, now called the National Metropolitan Bank of Washington, D. C.; that subsequently said Construction Company failed and defaulted

in the work so contracted for and said Thompson-Starrett Company was obliged to and did complete said work. After the completion of said work as aforesaid, there remained, and there is now in the hands of said Thompson-Starrett Company a balance of Ten Hundred and twenty-nine dollars and sixty cents ($1029.60). Said amount is not claimed by said Thompson-Starrett Company, but said Thompson-Starrett Company does not know to whom said money is due and payable because of the conflicting claims thereto. On information and belief the said Thompson-Starrett Company says that said Southern Construction Company is now and has been since the 17th day of September, 1907, in the hands of a receiver, one George R. Willis, appointed by a court of competent jurisdiction of the State of Maryland, sitting at Baltimore, in said State, which receiver has called upon said Thompson-Starrett Company to pay over to him any balance there may be in its hands due to said Southern Construction Company.

Moreover, said fund is also claimed by one J. Hurst Purnell by reason of the fact as claimed, that said Purnell by furnishing labor and materials to the said Thompson-Starrett Company for the benefit of, and in order to reduce certain obligations of said Southern Construction Company, claims certain credits, the exact amount of which is unknown to the said Thompson-Starrett Company. Said fund is also claimed by the National Metropolitan Bank for the reason that on or about the 17th day of February, 1906, said Southern
10 Construction Company assigned its right to any payments that might become due to it under said contract to the said bank.

For the reasons above set forth said Thompson-Starrett Company being unable to ascertain whether or not it has any credits or chattels in its hands, which belong to or are due to said Southern Construction Company, answers each of said interrogatories in the negative.

THOMPSON-STARRETT CO.,
By W. D. DAVIDGE,
Attorney-in-Fact.

DISTRICT OF COLUMBIA, *ss:*

Walter D. Davidge being duly sworn deposes and says that he is the attorney in fact of said Thompson-Starrett Company and that the matters and things set forth in the foregoing answer to the best of his information and belief are true.

WALTER D. DAVIDGE.

Sworn to and subscribed before me this 12th day of March, 1907.
J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Ass't Cl'k.

11 *Memorandum.*

April 10, 1907.—Order for Publication against absent defendant signed and issued.

Joinder of Issue.

Filed Apr. 23, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 48775.

S. DANA LINCOLN, Trading as the National Mortar Company,
v.
SOUTHERN CONSTRUCTION COMPANY, a Corporation.

Now comes the plaintiff, S. Dana Lincoln, trading as the National Mortar Company, and hereby joins issue with the Thompson-Starrett Company, garnishee herein, on its return filed in this cause.

PERCIVAL M. BROWN,
Attorney for Plaintiff.

Memoranda.

June 2, 1908.—$1029.60 deposited in Registry by W. D. Davidge.
Sept. 23, 1908.—Note of issue and notice of trial, filed.

12 *Petition for Leave to Intervene.*

Filed Oct. 27, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 48775.

S. DANA LINCOLN
vs.
SOUTHERN CONSTRUCTION COMPANY.

Now comes the National Metropolitan Bank, of Washington, D. C., and moves the Court for leave to be allowed to intervene in the above entitled cause.

RALSTON, SIDDONS & RICHARDSON,
Attorneys for National Metropolitan Bank.

Petition of Intervention of the National Metropolitan Bank.

Filed Oct. 27, 1909.

* * * * * * *

The National Metropolitan Bank, by leave of Court first had and obtained, files this, its petition of intervention in the above entitled cause, and respectfully says:

1. That it is a corporation, duly incorporated under the laws of the United States and doing business in the District of Columbia.

2. That heretofore, to wit, on the 17th day of February, 1906, the defendant, Southern Construction Company gave an order upon the Thompson-Starrett Company, a party herein, directing it to pay over to this intervenor any and all payments, as they might be-
13 come due according to the contract of the Southern Construction Company with the Thompson-Starrett Company, for work to be done on the National Metropolitan Citizens Bank Building, and that such order was forthwith duly accepted by the Thompson-Starrett Company, and that such order and acceptance thereof at once communicated to this intervenor. That thereafter, and prior to the filing of the attachment in this case, there became due to the Southern Construction Company by the Thompson-Starrett Company, because of the work upon the building of the intervenor, a large sum, to wit, the sum of Twelve Hundred (1200.00) Dollars, which sum, or so much thereof as the Thompson-Starrett Company admits to have been due by it to the Southern Construction Company, has been paid into the registry of this Court, attachment having been served herein upon the Thompson-Starrett Company, before said payment could be made.

That at and before the time of the service of said attachment, there was so due to the intervenor herein, by the Southern Construction Company, the sum of Twelve Hundred (1200) Dollars, for which it had given its note to the National Metropolitan Bank, dated August 14, 1906, payable sixty days after date, with interest at the rate of six per cent per annum until paid.

Wherefore this intervenor prays: That the moneys now in the registry of this Court may be condemned to its use, and directed to be paid over to it, and that it may have such other and further relief as it is entitled to in the premises.

NATIONAL METROPOLITAN BANK,
By J. GALES MOORE, *Auditor.*
RALSTON, SIDDONS &
RICHARDSON, *Attorneys.*

14 DISTRICT OF COLUMBIA, *ss:*

J. Gales Moore, being first duly sworn, on oath says that he is the Auditor of the National Metropolitan Bank, and as such is familiar with the facts set out in the foregoing petition for intervention, by him signed; that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and that as to the same, he believes it to be true.

J. GALES MOORE.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia aforesaid, this 25th day of October, A. D. 1909.

HARVEY T. WINFIELD, [SEAL.]
Notary Public.

15 (Endorsed:) Let the Petition of Intervention be filed. Harry M. Clabaugh, Chief Justice.

Amended Petition of Intervention of the National Metropolitan Bank.

Filed Nov. 4, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 48775.

S. DANA LINCOLN
vs.
SOUTHERN CONSTRUCTION COMPANY.

The National Metropolitan Bank, by leave of Court first had and obtained, files this, its amended petition of intervention in the above entitled cause and respectfully says:

1. That it is a corporation, duly incorporated under the laws of the United States and doing business in the District of Columbia.

2. That heretofore, to wit, on the 17th day of February, 1906, the defendant, Southern Construction Company, gave an order upon the Thompson-Starrett Company, a party herein, directing it to pay over to this intervenor any and all payments as they might become due according to the contract of the Southern Construction Company with the Thompson-Starrett Company, for work to be
16 done on the National Metropolitan Citizens Bank Building, and that such order was forthwith duly accepted by the Thompson-Starrett Company, and that such order and acceptance thereof at once communicated to this intervenor, and that, relying upon such order and acceptance, the said Bank did, on or about the 19th day of February, 1906, loan to said Southern Construction Company the sum of Two Thousand (2,000) Dollars, taking its note therefor and holding said duly accepted order as collateral. That thereafter, and prior to the filing of the attachment in this case, there became due to the Southern Construction Company by the Thompson-Starrett Company, because of the work upon the building of the intervenor, a large sum, to wit, the sum of Twelve Hundred (1200) Dollars, which sum, or so much thereof as the Thompson-Starrett Company admits to have been due by it to the Southern Construction Company, has been paid into the registry of this Court, attachment having been served herein upon the Thompson-Starrett Company before said payment could be made.

That at and before the time of the service of said attachment there was and still is due to the said Bank, the intervenor herein, by the Southern Construction Company as balance of the aforementioned loan of Two Thousand (2,000) Dollars, the sum of Twelve Hundred (1200) Dollars, for which it gave, as a renewal of the aforesaid note for Two Thousand (2,000) Dollars, its note to the National Metropolitan Bank dated August 14, 1906, payable sixty days after date, with interest at the rate of six per centum per annum until

paid; the original note of Two Thousand (2,000) Dollars
17 having theretofore been reduced by the payment of interest and Eight Hundred (800) Dollars on account of the principal thereof, out of funds paid to the said intervening Bank by the Thompson-Starrett Company, pursuant to and in reliance upon the aforementioned assignment of February 17, 1906.

Wherefore this intervenor prays: That the moneys now in the registry of this Court may be condemned to its use, and directed to be paid over to it, and that it may have such other and further relief as it is entitled to in the premises.

NATIONAL METROPOLITAN BANK,
By GEO. W. WHITE, *President.*

DISTRICT OF COLUMBIA, *ss:*

Geo. W. White, being first duly sworn, on oath says that he is the President of the National Metropolitan Bank, of Washington, D. C., the intervenor in the above entitled cause and as such familiar with the facts stated in the foregoing amended petition, and authorized to make this affidavit; that the matters and things therein stated on his own knowledge are true and those stated upon information and belief he believes to be true.

GEO. W. WHITE.

Subscribed and sworn to before me this 3rd day of November, 1909.

[SEAL.] ALFRED B. BRIGGS,
Notary Public, D. C.

18 (Endorsed:) Let the amended petition be filed. Harry M. Clabaugh, Chief Justice.

Memorandum.

January 11, 1910.—Verdict for Claimant for $1029.60.

Supreme Court of the District of Columbia.

MONDAY, *January 17th,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, presiding.

* * * * * * *

No. 48775. At Law.

S. SANA LINCOLN, Trading as National Mortar Company, Plaintiff,
vs.
THE SOUTHERN CONSTRUCTION COMPANY, a Corporation, Defendant.

It appearing that under the Rule of Court judgment on verdict should be entered herein, it is so ordered. Whereupon, it having been ascertained by said verdict that the sum of Ten Hundred and

Twenty-nine Dollars and sixty cents ($1029.60) attached by the U. S. Marshal herein on September 1st, 1906, in the hands
19 of the Thompson-Starrett Company, garnishee, and since paid by said garnishee into the Registry of this Court, is the property of the National Metropolitan Bank, Claimant herein, it is ordered that said sum of $1029.60 as aforesaid attached be, and the same is hereby discharged from such levy, that said attachment be, and the same is hereby dissolved. Wherefore, it is considered that the said claimant recover of the plaintiff S. Dana Lincoln, its costs incurred herein to be taxed by the clerk and have execution thereof.

Thereupon the plaintiff S. Dana Lincoln, by his attorney, Mr. Percival M. Brown, in open Court, notes an appeal to the Court of Appeals of the District of Columbia.

Memorandum.

January 19, 1910.—Supersedeas bond fixed in the sum of $300.00.

20 Filed Jan. 24, 1910. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

At Law. No. 48775.

S. Dana Lincoln, Trading as National Mortar Company,

vs.

The Southern Construction Company, a Corporation.

The President of the United States to The National Metropolitan Bank, Intervenor, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal entered in the Supreme Court of the District of Columbia, on the 17th day of January, 1910, wherein S. Dana Lincoln, trading as National Mortar Company, a corporation, is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 21st day of January in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By H. BINGHAM,
Ass't Clerk.

Service of the above Citation accepted this 22 day of January, 1910.

RALSTON, SIDDONS & RICHARDSON,
Attorney- for Appellee.

[Endorsed:] No. 48775. Law. Lincoln, &c., vs. So. Construction Co. Citation. Issued Jan. 21, 1910. Served cop. of the within Citation on —— ——. —— ——, Marshal. P. M. Brown, Attorney for appellant. Filed Jan. 24, 1910. J. R. Young, Clerk.

21 Supreme Court of the District of Columbia.

TUESDAY, *March 1st*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

No. 48775. At Law.

S. DANA LINCOLN, Plaintiff,
vs.
SOUTHERN CONSTRUCTION COMPANY, Defendant.

Comes now the plaintiff and submitting to the court the bill of exceptions taken at the trial of this cause, prays that the same be signed and made of record nunc pro tunc, which is hereby so ordered and accordingly done.

Bill of Exceptions.

Filed Mar. 1, 1910.

In the Supreme Court of the District of Columbia.

Law. No. 48775.

S. SANA LINCOLN
vs.
SOUTHERN CONSTRUCTION COMPANY.

Be it remembered that the above entitled cause came on for trial before Mr. Justice Clabaugh and a jury, on the 6th day of January, 1910, and on the issue made by the pleadings in this case
22 between the plaintiff and the intervenor herein, The National Metropolitan Bank, hereinafter called the claimant, whereupon, and before the jury was sworn, the plaintiff made the following motion:

"Now comes the plaintiff, S. Dana Lincoln, by Percival M. Brown and Walter B. Guy, his attorneys, and demurs specially and moves the Court to strike from the records in this case the intervening petition and the amended petition of intervention of the National Metropolitan Bank and as ground for said motion says as follows:

1. That said petition and amended petition are vague, indefinite and failed to give the plaintiff any proper information as to the claim of said intervener so as to enable the plaintiff to make a proper defense thereto.

2. That said petition and amended petition are so vague and indefinite that they do not provide material issues to be submitted for trial.

3. That said petition and amended petition do not state any consideration for the alleged assignment set up by said intervenor, nor do they state that there was any consideration for the same or any agreement that said assignment was to be given in consideration of any loan to be made by said intervenor, but that said petition and amended petition of said intervenor merely state that relying upon such order said bank made a certain loan and whether intervenor relied or did not reply upon the facts set up in his petition is immaterial.

4. Because no copy of the order referred to and no copy of
23 an agreement, if any existed, is set up in said petition or amended petition of said intervenor and no sufficient pleading to advise the plaintiff of the nature or character of said order or agreement is set out and the manner and form of the execution of the same is not pleaded and the plaintiff, if compelled to go to trial without a sufficient pleading, will be entirely in the dark as to the sufficiency and character of the claim of the intervenor and will have no adequate opportunity to prepare for a defense to the same. That the claim of the said intervenor is barred by the statute of limitations not having been asserted within three years from the time said alleged cause of action of intervenor accrued.

5. Because the notes referred to in said petition and amended petition of the intervenor are not set out nor sufficiently pleaded so as to enable the plaintiff to know who are the parties thereto or to inquire into the matter as to whether the second note referred to was made by the same parties as the first note and was a proper substitution of securities. Because said intervenor does not state that defendants in attachment have no other property or that they have no other security out of which they can satisfy their claim.

6. Because said petition and amended petition are in other respects vague, incomplete and indefinite and do not contain a complete or sufficient statement of pleading of any claim on the part of said intervenor such as ought to require the plaintiff to go to trial on said petition and amended petition of said intervenor."

The plaintiff asked the Court to rule on said motion, where-
24 upon the Court overruled the same, to which said ruling the plaintiff, through his attorney, then and there excepted, and said exception was duly noted by the Court upon its minutes; that thereafter the jury was sworn to try the issue made by the pleadings in this case, between the plaintiff and the said claimant; whereupon the said claimant, to maintain the issues on its part joined, offered as a witness JOHN H. PURNELL, who testified as follows:

That he was a resident of Baltimore, and was Secretary and Treasurer of the Southern Construction Company, the defendant in this case; whereupon the witness was shown a paper purporting to be a contract between the Southern Construction Company and the Thompson-Starrett Company, whereby said Southern Construction Company sub-contracted with said Thompson-Starrett Company to

do a certain part of the work of erecting a building, which said Thompson-Starrett Company was under contract to erect, and which was known as The National Metropolitan Bank Building. The witness testified that the signatures to said contract were those of Warfield Ward, President of the Southern Construction Company, and his own as Secretary and Treasurer, and that the seal affixed to said contract was that of the Southern Construction Company. The witness testified that when the Southern Construction Company received this contract from the Thompson-Starrett Company, they had a great deal of material on hand and were quite far ahead with the work; that the Southern Construction Company was to be paid by the Thompson-Starrett Company as the work progressed, so much each month, he thought; that the Southern Construction Company applied to the National Metropolitan Bank for a loan of Two
25 Thousand Dollars, for which they agreed to give as collateral an assignment to the National Metropolitan Bank for any money that was due or might become due to the Southern Construction Company under the said contract of the Southern Construction Company with the Thompson-Starrett Company.

Witness was then shown a paper reading as follows:

FEB. 15, 1906.

"Mr. E. S. Parker, President National Metropolitan Citizens Bank, Washington, D. C.

DEAR SIR: Confirming the conversation the writer had with you this morning, we beg to make application for a loan of $2,000. We have at present $6,000 worth of hollow tile fireproofing stored in Washington, which is to be used in fireproofing your new building. We are willing to assign this material over to you, and likewise any payment which will be due us from the Thompson-Starrett Company on our erection of the work. This loan to be placed to our credit in your bank and to be subject to our check.

We would be very glad to have an answer from you by Saturday, February 17th.

Respectfully submitted,

SOUTHERN CONSTRUCTION CO.
WARFIELD WARD, *President.*"

Whereupon the witness testified that the signature to said letter was that of Warfield Ward, President of the Southern Construction Company, and that he is the same Warfield Ward who signed
26 said contract between the Southern Construction Company and the Thompson-Starrett Company. The said letter was offered in evidence, whereupon the plaintiff through his attorney objected to the admission of said paper in evidence on the ground that the same was not sufficiently proved as an act of the said Southern Construction Company, and after argument the said letter was admitted, subject to an exception taken by the plaintiff and noted by the Court on its minutes. Thereupon the witness was shown a letter reading as follows:

"BALTIMORE, *February* 17, 1906.

Messrs. Thompson-Starrett Co., 14th and G Streets N. W., Washington, D. C.

GENTLEMEN: We hereby authorize you to pay over to The National Metropolitan Citizens Bank any and all payments as they may become due according to our contract with you for work to be done on the National Metropolitan Citizens Bank Building.

Very truly yours,

[SEAL.] SOUTHERN CONSTRUCTION COMPANY.
WARFIELD WARD, *President.*
J. HURST PURNELL,
Sec. & Treas.

Accepted by
THOMPSON-STARRETT CO.
B. C. DICKINSON, *Mgr.*"

Whereupon the witness stated that said paper was signed by Mr. Ward and himself as officers of the Southern Construction Company, and that the seal on said paper was that of the Southern Construction Company. The attorney for the claimant thereupon stated that he was waiting for a witness to prove the signa-
27 ture of the Thompson-Starrett Company's manager to said paper, and would not offer the same in evidence until he arrived; thereupon the witness was asked what the practice of his Company was in signing contracts and papers generally, to which he replied that they were signed by the President and Secretary and Treasurer; the witness was asked how many stockholders there were in the Southern Construction Company, and witness replied that there were three, to both of which questions the plaintiff through his attorney objected on the ground that proof of the custom of the Southern Construction Company and of the number of stock-holders could not properly be made in this manner, but that the customs of the company should be proved by the parties with whom the company had transactions, and that the stock books or other proper books of the company should be produced to show who were the stock-holders therein; and after argument the court overruled the objection of the plaintiff, to which ruling the plaintiff then and there duly excepted and said exception was noted on the minutes of the court.

Whereupon the witness was asked the following question:

"Q. In your company, the Southern Construction Company, were the officers of the company authorized to make contracts?"

And the witness answered as follows:

"A. They were."

To the admission of which evidence the plaintiff, through his attorney objected on the ground that the answer was a mere self serving declaration by an incompetent witness. Whereupon the court ruled as follows:

28 "By the COURT: If this was a custom and *it if* is going to be a custom you are depending on, then you must prove the

custom, of course. I would assume that the law would justify the contract being made by the officers of the company within the pursuit of their particular business."

Thereupon the witness was asked if the Southern Construction Company ever had any meeting of the Board of Directors of said company to authorize contracts or papers to be executed on behalf of the company in the manner testified to by the witness. To which question, the witness replied "No." Thereupon the plaintiff through his attorney objected to this witness testifying in response to a question as to what had been done in meetings of the Board of Directors of the Southern Construction Company to authorize papers and contracts to be executed, as testified to by the witness, on the ground that the minutes of the meetings of the Board of Directors of the Southern Construction Company should be produced in proof of such matters, which objection was overruled by the Court, and the plaintiff by his counsel then and there excepted to the ruling of the court, which said exception was duly noted on the minutes of the court. The witness was then asked, after the date of the paper which he had identified, dated Baltimore, February 17, 1906, what, if he knew, became of the money accruing to the benefit of the Southern Construction Company from the Thompson-Starrett Company, to which witness replied that the money which was due the
29 Southern Construction Company for work done on the Metropolitan Bank, was sent by the Thompson-Starrett Company to the National Metropolitan Bank; that none of the funds came direct to the Southern Construction Company after this loan was made to the Southern Construction Company by the National Metropolitan Bank. To this question and answer the plaintiff, through his attorney, objected, whereupon the court said:

By the COURT: "I did not know that he was going to answer that. You have not proved that any loan was made yet."

And after argument the court said:

By the COURT: "Anything due from the Thompson-Starrett Company to the Southern Construction Company was placed to the credit of this bank by virtue of an assignment you say you will prove when the witness comes in."

To which the attorney for the claimant replied:

"That is the idea."

Whereupon the court said:

By the COURT: "This last answer of the witness is permitted to stand upon the promise to follow it up with the proof you have suggested."

Whereupon the examination of the witness John H. Purnell was suspended, and the claimant to further support the issues on its part joined, offered as a witness FRANK E. GHISELLI, who testified as follows:

That he is the Paying Teller of The Commercial National Bank; this witness was shown the letter to the Thompson-Starrett Company, dated, Baltimore, February 17, 1906, authorizing the Thompson-Starrett Company to pay over to the National Metropolitan Bank

any and all payments on the contract of the Southern Con-
30 struction Company with said Thompson-Starrett Company,
and signed "Southern Construction Company, Warfield Ward, President, J. Hurst Purnell, Secretary and Treasurer," and was asked to look at the signature in the lower left hand corner of said paper, and he replied:

"Yes, I know it very well, B. C. Dickinson, Manager of the Thompson-Starrett Company;" thereupon, the attorney for the claimant offered said paper in evidence, and to the admission of said paper, the plaintiff, through his attorney, objected on the ground that there was no sufficient evidence to show that this paper was executed in a way to bind the company through proper corporate action, and that it was not an assignment, and for other reasons which the court directed might be raised at the close of claimant's case, and directed that said paper might be admitted subject to exception on the ground stated, and others that might be argued at the close of claimant's case in chief, and said exception was then and there duly noted on the minutes of the court.

In response to a question by the court as to whether there were any directors of this company, the witness Purnell replied that there were, and at the time of the execution of said paper writing dated, Baltimore, February 17, 1906, Mr. Ward, Mr. Hubner and the witness were directors of the Southern Construction Company.

The witness, JOHN H. PURNELL, was again called and further testified as follows:

That the Southern Construction Company was organized as a construction company. In response to a question to state what was done with respect to contracts when the company wanted to build anything, the witness testified as follows: "We put in bids for work and
we were notified whether or not our contract was accepted.
31 The contract was signed by Mr. Ward, as President, and by
myself as Secretary, with the seal of the company and that was considered as a binding contract on our part with the parties of the other part." Witness further stated that that is the way the business was conducted, and that the practice in case of borrowing money for the business purposes of the Southern Construction Company was the same; in response to a question by the court as to how that custom grew up, witness replied: "The company was established by Mr. Ward and myself, and if we wanted to borrow money at the bank, we would either go there and sign a note, both of us—it required the signature of both Mr. Ward and myself for all contracts and all checks. That was considered binding on the company, a contract or obligation of any kind." The witness was asked, who in the company knew of this character of dealing, and replied: "I should say the minutes of the company should show that it required the signature of two of the officers of the company to bind it. I know it required the signatures of two officers for checks. The witness would not say that this authority or custom was authorized by the by-laws of the company, because he had not looked at the by-laws but stated that it was certainly the custom and the only custom the company had in regard to making contracts. That said custom was within the

knowledge and by the consent of all the stock-holders of the company. The plaintiff, through his attorney, objected to this testimony on the ground that the facts stated ought to be shown by some record. In response to questions put by the court the witness
32 replied that he had no record here; that the company had held stock-holders' meetings; that the company was first organized in 1905, and about a year after that time went into the hands of a receiver, and the witness supposed the receiver had the minutes; that the witness did not have the minutes. The plaintiff, through his attorney, objected to the admission of this testimony. Whereupon the court ruled that the evidence should be admitted subject to the exception of plaintiff and said exception was then and there noted on the minutes of the court. The witness further stated that he thought Mr. Ward, Mr. Hubner, and the witness, and he thought two others, were originally the directors of the company, and that the two others were not practically interested in the company after the organization. Asked about the custom of the Southern Construction Company in regard to making contracts, the witness replied that he understood that all contracts made by the President and Secretary, by the Southern Construction Company, were binding; all contracts of any kind or description ever made by them, were simply always signed by Mr. Ward and witness as officers of the company, with the seal of the company; it was not necessary and not the custom to have a directors' meeting every time a contract was entered into; asked if the directors ever authorized this course of action, the witness replied: "I think so, but I would not like to swear that it was in the minutes without referring to them, it has been three or four years ago now." The witness further stated that the other directors in the Southern Construction Company knew that contracts were being made in the
33 manner stated by witness. Witness stated that he had had dealings with Mr. B. C. Dickinson, the Manager of the Thompson-Starrett Company, and that witness dealt with Mr. Dickinson as the representative of the Thompson-Starrett Company; that after the assignment, dated Baltimore, February 17, 1906, the National Metropolitan Bank loaned the Southern Construction Company, two thousand dollars, accepting the said paper relied upon by the claimant as an assignment as collateral security for said loan; that said loan was carried right along and renewed several times until August, of 1906, when said loan was reduced to Twelve Hundred Dollars.

Witness was then handed the paper reading as follows:

"*Note.*

$1200.00. WASHINGTON, D. C., *Aug.* 14, 1906.

Sixty days after date we promise to pay to the order of ourselves Twelve Hundred Dollars, at National Metropolitan Bank, Washington, D. C.

SOUTHERN CONSTRUCTION CO.,
WARFIELD WARD, *President,*
J. HURST PURNELL, *Sect. Tr.*

Value received.
No. —.
Due Oct. 15."

Indorsed on the back as follows:

"J. Hurst Purnell
Warfield Ward
Southern Construction Company
Warfield Ward, President
J. Hurst Purnell, sec. tr.
410 Cont. Bldg.
Balto. Md."

34 Witness stated that this is the note of the Southern Construction Company, made payable to its own order, signed by the Southern Construction Company and indorsed by the Southern Construction Company and made out in the handwriting of witness. The attorney for the claimant then offered this note in evidence, to the admission of which the plaintiff, through his attorney, objected on the ground that proof of the right of two officers to make said note as a binding obligation on the Southern Construction Company had not been sufficiently made, whereupon the court ruled that said note might be admitted subject to an exception made by the plaintiff, which said exception was then and there duly noted on the minutes of the court. The witness further stated that the original note given by the company was in the amount of two thousand dollars, and that said original note was subsequently reduced to the sum of twelve hundred dollars, which said note is still due to the bank. Witness further stated that there were three stockholders in the Southern Construction Company, who were Mr. Ward, Mr. Hubner and the witness.

On cross examination this witness was asked why after the execution of the paper writing relied on as an assignment by the claimant the witness Purnell personally claimed that money due from the Thompson-Starrett Company to the Southern Construction Company on account of said contract between them, belonged to him personally, and he replied that it was because he had indorsed the note of the Southern Construction Company held by the National Metropolitan Bank. The attention of the witness was called to the statement of the Thompson-Starrett Company in its answer to the
35 writ of garnishment served on said company by the plaintiff, in which said Thompson-Starrett Company stated that the witness, J. Hurst Purnell, personally claimed the money in the hands of the Thompson-Starrett Company due to the Southern Construction Company under the said contract between them as well as that said fund was claimed by the National Metropolitan Bank, and witness replied that he put up funds going towards the completion of the contract of the Southern Construction Company. Witness was then asked what right he had to claim this money if it had already been assigned, and witness replied: "My idea of claiming any money that would be assigned to them was that there would be more than the $1200 left over from the contract. Any over that $1200 should have come to me by virtue of the fact that I helped the Thompson-Starrett Company personally to complete the contract, the Southern Construction Company having gone into the hands of a receiver in

the meantime." The witness was asked if he did not claim the whole fund in the hands of the Thompson-Starrett Company, and he replied that he did not recall claiming the whole fund, that he did not know what the exact amount was. The witness was again shown the answer of the Thompson-Starrett Company to the said writ of garnishment, and stated that he did not think he had ever seen it before, and read as follows:

"Moreover said fund is also claimed by one J. Hurst Purnell, by reason of the fact as claimed by said Purnell that he furnished labor and materials to the Thompson-Starrett Company for the benefit of and in order to reduce certain obligations of the said South-
36 ern Construction Company, claims certain credits the exact amount of which is unknown to said Thompson-Starrett Company."

Witness further stated that said fund was claimed by him by virtue of the fact that the note held by the National Metropolitan Bank was indorsed by witness and Warfield Ward, and they had advanced certain funds for the completion of the contract of the Southern Construction Company. Witness was asked if it was not a fact that since the time when he put in a claim with the Thompson-Starrett Company on this fund, that he had changed his mind and that at the time when he put in his claim to the fund, he claimed it as against the National Metropolitan Bank, and the witness replied that he did not put in any claim for an exact amount; that he did not recall it except in a general way, and that he did not think he had changed his mind. Witness further stated that when said paper dated, Baltimore, February 17, 1906, relied upon by the claimant as an assignment was given it was not intended to secure a note already overdue that this loan transaction of two thousand dollars was the first transaction that the Southern Construction Company ever had with the National Metropolitan Bank; that witness had indorsed said notes given to the National Metropolitan Bank because of said loan of two thousand dollars; that witness never had any personal loans with said bank; that the National Metropolitan Bank had no other collateral as security for said loan of two thousand dollars excepting the said paper relied on by the claimant as an assignment, and said notes given by the Southern Construction
37 Company, with the indorsement thereon of the witness and Warfield Ward; that none of this two thousand dollars loan went to the personal use of the witness. That at the time when said note was given to the National Metropolitan Bank, the Southern Construction Company was also working on a contract at Freedman's Hospital in this District. That besides the money coming into the Southern Construction Company from the Thompson-Starrett Company, the said Southern Construction Company had some building forms and cement at said Freedman's Hospital.

To further maintain the issues on its part joined the claimant offered as a witness, ALBERT H. BEDFORD, who testified as follows:

That he is note teller at the National Metropolitan Bank; that he is familiar with the transaction between the bank and the Southern Construction Company, so far as their notes were concerned; that

relations between the bank and the Southern Construction Company commenced February 19, 1906; that on February 19, 1906, the note of the Southern Construction Company was discounted by the National Metropolitan Bank, and placed to the credit of the Southern Construction Company; that on April 19th said note was renewed for two thousand dollars; that on June 15th said note was again renewed for two thousand dollars, with the endorsements of Warfield Ward and J. Hurst Purnell supplied. That the next renewal of said note was August 15th; that on that date the amount of the note was reduced to twelve hundred dollars, and a new note for twelve
38 hundred dollars with the same indorsements was then taken by the bank. Witness was asked if he knew where the credit of eight hundred dollars came from, and he replied "I am not absolutely clear on that, but I think that the records of the bank will show that it was a check of the Southern Construction Company."

Witness further stated that said twelve hundred dollar note is still due and unpaid. The witness knew of no other transaction between the bank and the Southern Construction Company except in regard to said loan.

On cross examination this witness stated that the proceeds of the note for $2,000 was placed to the credit of the Southern Construction Company on the individual books of the National Metropolitan Bank, and that the witness did not have charge of the individual books of said bank, therefore he could not state the amount and number of the checks, but he knows that the amount of the original loan went to the credit of the Southern Construction Company on the individual books of the Bank, subject to the check of the Southern Construction Company; that in cashing the checks of the Southern Construction Company, they recognized the signatures of Mr. Warfield Ward, and Mr. J. Hurst Purnell, as having authority to sign checks for the Southern Construction Company; that he is not sure that both Mr. Warfield and Mr. J. Hurst Purnell signed all the checks for the Southern Construction Company, but he thinks that they did; that the notes which the bank received from the Southern Construction Company were signed by Mr. Warfield Ward and Mr. J. Hurst Purnell; that on October 15, 1906, Mr. Purnell
39 signed a collateral note with the note of the Southern Construction Company as collateral, in order that the bank might carry the note in a form other than its past due state; in other words he gave his note secured by the unpaid note of the Southern Construction Company; that would keep the amount alive as to the bills and notes of the bank; that the amount of said individual note of said J. Hurst Purnell was $1,200, and as the collateral security for this, he gave the $1,200 note of the Southern Construction Company; that the bank required this note of J. Hurst Purnell and prevailed upon said Purnell to give his individual note secured by the said note of the Southern Construction Company, in order to get the matter out of the shape of past due paper; that the original note of the Southern Construction Company for $2,000, on which the first loan was made to the Southern Construction Company by the bank, was surrendered to the Southern Construction Company, on the

renewal thereof, and is not now in the possession of the bank; that Mr. Purnell's indorsement was not on the original note for $2,000, but the indorsement of Mr. Purnell, and Mr. Ward, is on the $1,200 note; that there were no indorsements on the original note for $2,000; that the original note for $2,000 was discounted February 19, 1906; the assignment made by the Southern Construction Company of funds to become due to it from the Thompson-Starrett Company was possibly received subsequently to the time when the loan on the original note for $2,000 was made, because Mr. Parker, the President of the Bank told the witness some days prior to the time when the loan was made that such loan would be made on the
40 strength of the assignment; that witness had no entry to show when the assignment was received by the bank.

On re-direct examination the witness stated in reply to a question by the attorney for the bank, that the note handed to him by said attorney, dated July 15, 1907, was the note which Mr. Purnell signed, and to secure which the $1,200 note of the Southern Construction Company was given as collateral security; and the bank then offered said individual note in evidence. Said note reads as follows:

$1200.00. WASHINGTON, D. C., *July* 15, 1907.

On demand, for value received, I promise to pay to the National Metropolitan Bank of Washington, or order, at office of said Bank, in the city of Washington, D. C., Twelve hundred dollars, with interest at the rate of six per cent per annum, having deposited with said Bank, as collateral security for the payment of this note, and also as collateral for all other present and future demands, of any and all kind, of the said Bank against the undersigned, due, or not due, the following property, viz:

Note Southern Construction Company for $1200 dated Aug. 14th, 1906, for 60 days, endorsed by Warfield Ward and J. Hurst Purnell and do hereby authorize the said Bank, on the non-performance of this promise or the non-payment of any of the demands aforesaid, or failure to furnish further security as hereafter agreed, to sell the whole or any part of said collaterals or substitutes therefor
41 or additions thereto, at any Broker's Board or public or private sale, at the option of the said bank, without notice of intention to sell or of the time or place of sale, and without demand of payment of this note or of any of the said demands, and after deducting all expenses of collection and sale, to apply the residue of the proceeds to pay any or all of said demands, in whole or in part, due or not due, including this note, making rebate of interest upon demands not matured by their terms; and hereby agree that at any such sale the said Bank may become the purchaser of any or all of said collaterals and may hold the same hereafter in its own right absolutely free from any claim of the undersigned; and agree that in case of deficiency the undersigned will pay to the said Bank the amount thereof forthwith after such sale, with legal interest; and do further agree that if, in the opinion of said Bank, or any of its officers, the market value of the said collaterals, or any substituted or hereafter deposited, or the remainder, after the application of any part thereof to any other note or claim, for which I may be liable,

shall at any time be less than ten per cent beyond the amount of this note and interest, the undersigned will immediately furnish such further security as will be satisfactory to the said Bank, and that in case of failure so to do, this note, thereupon, at the option of the said Bank, shall become due and payable forthwith, the said Bank being also authorized in such case to sell the collaterals or any part thereof, as above provided; it is understood that all securities hereby and hereafter pledged shall in like manner be ap-
42 plicable to secure payment of any past and future obligations of the undersigned, and all securities in the possession of the Bank shall stand as one general continuing collateral security for all obligations due or to become due to the Bank; and it is hereby further agreed that upon the transfer of this note, the said Bank may deliver the said collaterals or any part thereof, to the transferee, who shall thereupon become vested with all the powers and rights above given to the said Bank in respect thereto, and the said Bank shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter.

And I do further agree that should any litigation ensue to said Bank with respect to the collection of the said note or the holding or sale of the said collateral security or any part thereof, the said Bank shall be paid such reasonable Counsel fees as it shall have paid to its attorney for the conduct of such litigation, which sum shall be also secured by said collateral security, and be payable on demand of said bank, in default of which payment said collateral security may be sold as is hereinbefore provided, and I do hereby promise to pay to said Bank any deficiency resulting from the inadequacy of said collateral security in this respect.

J. Hurst Purnell.
Maryland Telephone Building,
Baltimore, Md.

Interest payments.		Paid to, inclusive.
Oct. 1, 1907,	15.60	Sept. 30/07
Jan. 2, 1908	18.40	Dec. 31/07
May 15, 1908	18.20	Mch. 31/08
Jan. 22, 1909	51.60	Dec. 14/08."

43 The witness further stated that said note of the Southern Construction Company for $1200 matured October 15th, at which time Mr. Purnell gave his individual note, which witness called the collateral note, and that said individual note of Purnell was secured by said $1,200 note of the Southern Construction Company; that the $1,200 note of the Southern Construction Company from about the middle of October, 1906, to the middle of July, 1907, would have been classed as overdue on the books of the bank, if they had not received said individual note of Mr. Purnell; that the $1,200 note of the Southern Construction Company matured October 15, 1906.

The witness was then asked the following question:

"Q. From that date (Oct. 15, 1906) to July 15th, the note of the

Southern Construction Company, was overdue paper on the books of the Bank? A. No sir.

Q. Why not? A. Well it would have been, so far as it was overdue—and is overdue now—so far as the Southern Construction Company is concerned, the note of the Southern Construction Company from October 15, 1906, up to the present time on the books of the bank is past due paper."

The witness further stated that on October 15, 1906, said Purnell gave his individual note for the amount due by the Southern Construction Company on said $1,200 note and renewed said individual note from time to time, and that the individual note of Purnell,
copied in the record, was the last renewal; to prevent over-
44 due paper being kept in the bank, the individual note of Purnell was given.

On re-cross examination, the witness stated that he did not know what had been done by the Bank in the way of an effort to collect on said individual note of Purnell; that that matter would not come within the scope of his duties, but that witness knew that nothing had been collected on said note.

Whereupon the claimant to further maintain the issues on its part joined, offered as a witness one J. GALES MOORE who being first duly sworn testified as follows:

That he is Auditor of the National Metropolitan Bank; that he has held that position for about a year, and that for about eight years prior to his service as Auditor he had been Cashier of said bank; that he remembered the loan in the amount of $2,000, made by said bank to the Southern Construction Company; that said loan had been repaid in part, but that a balance of $1,200 on the same is still due; that the present name of said Bank is The National Metropolitan Bank; that it changed its name in October, 1904, and then became known as the National Metropolitan Citizens' Bank, and that in January, 1906, it resumed its present name, which was the name of the bank prior to October, 1904.

On cross-examination the witness was asked to look at the individual note of J. Hurst Purnell copied into the record, and state if the primary liability under that note was not on J. Hurst Purnell,
and if the said note of the Southern Construction Company
45 was not collateral security according to the terms of said individual note of Purnell. After examining the individual note of Purnell, the witness stated:

"This note was given to keep an overdue note of the Southern Construction Company off the books, balance of $1,200 due on the Southern Construction Company note, and the note was taken from Mr. Purnell with that Southern Construction Company note as collateral in order to keep the paper alive, take the overdue paper off the books."

The witness stated that after the date of the paper relied upon as an assignment, the Bank received a payment of $800 on the original loan, and that it is the only payment on account of said loan that he remembers; witness stated that he could not say whether all the money received by the bank from the Thompson-Starrett Company

after the date of said $1,200 note was applied on that note or not; that the transcript of the account would show whether there was a small balance left after the eight hundred dollar payment; that according to witness' recollection the greater part of the money received from the Thompson-Starrett Company after the date of said $1,200 note was applied on it; that the ledger of the bank now shows that there is $12.20 in the account of the Southern Construction Company at said bank; that witness does not know what, if any, efforts were made by the bank to force payment of said $1,200 note of J. Hurst Purnell; witness stated that he did not know of any agreement made by the bank with J. Hurst Purnell, that they would not force
46 payment of his said note, until the matter of the assignment had been cleared up; that if any such agreement had been made he would not necessarily know of it; that witness did not know why, at the time of the original loan from said bank to the Southern Construction Company, the bank took the assignment for all that might become due from the Thompson-Starrett Company to the Southern Construction Company, instead of an assignment of $2,000 or the amount that was loaned, and that he did not know whether the bank made any agreement as to what it was to do with the surplus, if the bank should get more than the amount loaned from the Thompson-Starrett Company on the strength of the assignment made to the bank; the witness stated that he would not know about such a matter; that the former President of the bank would know. Witness stated that he could not remember the date when the assignment made by the Southern Construction Company on the Thompson-Starrett Company in favor of the bank, was received, but he is under the impression that it was put in at the time when the first note was made; that the books of the bank would not show when said assignment was received by the bank, and that there was no record of the bank as to when said assignment was received; that witness did not know who prepared said assignment that he did not handle the transaction; that he presumed that said assignment would be held by the bank as additional security; that they make no entry on the books or records of the bank of what they call additional security, but it just goes in attached to the original papers and is kept in the safe of the bank.

47 On re-direct examination, the witness stated that to the best of his knowledge the said $1,200 note of J. Hurst Purnell had never been out of the bank.

Whereupon, to further maintain the issues on its part joined the plaintiff offered as a witness HENRY H. HUBNER, who being first duly sworn, testified as follows:

That he is a resident of Catonsville, a suburb of Baltimore, Maryland; that he was attorney for the Southern Construction Company when it was incorporated and acted as one of its directors; witness stated that he was familiar with the manner in which said Southern Construction Company executed contracts; that the business was run entirely by the President and Secretary and Treasurer, Mr. Ward and Mr. Purnell; that they had complete charge of its affairs; that the witness knew that himself; to the admission of which testimony,

the plaintiff, through its attorney objected on the ground that the witness could only state what he knew himself, and for the reasons heretofore given as to the proof of a custom by this kind of testimony, which objection was overruled by the Court, to which ruling the plaintiff through its attorney duly excepted, and said exception was then and there noted on the minutes of the Court; the witness stated that he was a stock-holder and director in the Southern Construction Company, and approved the manner of executing contracts and transacting business as stated by him.

On cross-examination this witness stated that the Southern
48 Construction Company was a Maryland Corporation; and that it is now in the hands of a receiver in Baltimore; that he never had any of the books of the company with the possible exception of their minute books for the purpose of writing up the minutes of the company's first meeting, then all the books were turned over to the company; that so far as witness knows, everything that was in his hands as attorney for the Southern Construction Company is in the hands of the receiver.

Whereupon the witness was asked the following question:

"Q. Do you know that the books are in the hands of the receiver? A. That is rather a hard question to answer."

Whereupon the claimant to further maintain the issues on its part joined, recalled as a witness the said FRANK E. GHISELLI, who testified as follows:

The witness was shown the paper relied upon as an assignment by the claimant, and stated that the signature thereon was that of Mr. Dickinson, the manager of the Thompson-Starrett Company; witness compared said signature with a card which was sent to the Commercial National Bank by the Thompson-Starrett Company; witness stated that said bank was advised by the Thompson-Starrett Company that B. C. Dickinson was its manager; that the Thompson-Starrett Company kept an account in the Commercial National Bank of Washington; witness identified a paper as an extract from the minutes of the Thompson-Starrett Company which he stated
49 was received by the Commercial National Bank from the home office of the Thompson-Starrett Company in New York, where they held their meetings. The following portion of the minutes of said Thompson-Starrett Company was read in evidence:

Extract from Minutes of Regular Meeting of the Finance Committee of the Thompson-Starrett Company, Held at the Office of the Company, No. 51 Wall St., N. Y. City, Sept. 7th, 1905, at 12:30 P. M.

"On motion duly seconded and carried it was

Resolved, that on and after September 15, 1905, Mr. B. C. Dickinson be and hereby is authorized to sign as Manager all checks drawn against the Company's account with the Commercial National Bank, Washington, D. C., in place of Mr. H. V. Sanford."

I hereby certify that the above is a true copy.

L. J. MORTON, *Treasurer.*

Sworn to before me this 14th day of Sept., 1905.

[SEAL.] CHARLES L. KINGSLEY,
Notary Public, N. Y. C.

The claimant, through its attorney, stated that it admitted that the Thompson-Starrett Company was a New York corporation.

Whereupon, to further maintain the issues on its part joined, the claimant recalled as a witness J. GALES MOORE, who testified
50 as follows:

The witness was shown the checks immediately thereafter offered in evidence by the claimant, and he stated that they are the checks of the Thompson-Starrett Company that were given to the National Metropolitan Citizens' Bank on account of work done on its new bank building by the Southern Construction Company; witness stated that these checks were credited to the account of the Southern Construction Company under the agreement between the bank and the company; the claimant, through its attorney then offered in evidence said checks received by it on account of said paper writing, dated February 17, 1906, relied upon by it as an assignment, as follows:

Check No. 9304, dated April 12, 1906, and drawn by the Thompson-Starrett Company upon the Corn Exchange Bank of New York, payable to the order of the National Metropolitan Citizens' Bank for $2,260.00.

Check No. 9893, dated April 12, 1906, and drawn by the Thompson-Starrett Company upon the Corn Exchange Bank of New York, payable to the order of the National Metropolitan Citizens' Bank in the sum of $4,540.00.

Check No. 10,589, dated May 19, 1906, and drawn by the Thompson-Starrett Company upon the Corn Exchange Bank of New York, payable to the order of the National Metropolitan Citizens' Bank for $250.00.

Check No. 10,934, dated June 13, 1906, and drawn by the Thompson-Starrett Company upon the Corn Exchange Bank of New York, payable to the National Metropolitan Citizens' Bank for $2,-141.97.

51 Check No. 11,225, dated July 13, 1906, and drawn by the Thompson-Starrett Company upon the Title Guaranty and Trust Company of New York, payable to the order of the National Metropolitan Citizens' Bank in the amount of $1,335.78.

Check No. 11,270, dated August 10, 1906, and drawn by the Thompson-Starrett Company upon the Title Guaranty and Trust Company of New York payable to the order of the National Metropolitan Citizens' Bank, in the amount of $885.50.

Each of said checks bore an indorsement to the effect that they were paid to the National Metropolitan Bank on account of the Southern Construction Company's contract on National Metropolitan Citizens' Bank.

Each of said checks bore the indorsement of the National Metropolitan Citizens' Bank of Washington, D. C., and a statement that

payment of the same was received through the New York Clearing House. Each of said checks, excepting the last, numbered 11,270, bore the indorsement of the payee, as follows: "Credit to the account of the Southern Construction Company."

The claimant to further maintain the issues on its part joined, then recalled as a witness J. H. PURNELL, who testified as follows:

The witness was asked how much was due the Southern Construction Company from the Thompson-Starrett Company, at the time of the institution of this suit, and replied that he could not say exactly but somewhere between twelve hundred and two thousand dollars.

52 On cross examination, the attention of the witness was called to the fact that the alleged assignment to the bank was dated February 19, 1906, and the checks offered in evidence aggregating over $11,000, were all paid to the bank after that date; the witness was asked whether the bank received money from the Thompson-Starrett Company after that and the witness replied that the checks were all made out for the account of the Southern Construction Company, in all instances except one, the bank gave the Southern Construction Company credit for the full amount of these checks, until August 10, 1906, the date of the last check for $885, when the Southern Construction Company asked the bank to renew the note for $2,000 and the bank refused to do this, but said that it would take a new note for $1,200, and thus the $2,000 note was reduced to $1,200. Witness was asked what authority he had to tell the bank how to apply the money received on these checks from the Thompson-Starrett Company, and replied that when the bank notified them that it had received a check for work which the Southern Construction Company had done the previous month, Mr. Ward and witness came over to see the bank and asked it to continue the loan for $2,000, and to let them have the check, and at their request, the bank would let them have the check; that they never received a cent from the Thompson-Starrett Company after the assignment was given to the bank; that they got that $885 in August by its being deducted from the $2,000 note; that the bank turned the amount of the said checks received by the bank after the date of the assignment over to them without collateral security; and that there

53 was always margin enough for the protection of the bank.

The claimant then stated that it rested its case, whereupon the plaintiff, through his attorney stated to the court that the evidence offered by the claimant in regard to the execution of the alleged assignment was objected to on the ground of its being insufficient, and that the paper relied upon by the claimant was not a valid or sufficient assignment; that a great deal of evidence went in subject to the ruling of the Court that it go in subject to exception, to which the Court replied that such matters could be passed upon, at the close of the case, and that the plaintiff could then extend the ground on which he based his exceptions to the evidence objected to by the plaintiff.

Thereupon the plaintiff to maintain the issues on his part joined, offered as a witness DAVID C. CHESTERMAN, who being first duly sworn, testified as follows:

That he is the manager of the plaintiff, the National Mortar Company. That the plaintiff sold the defendant, the Southern Construction Company, cement, and that the amount due to the said plaintiff from the said Southern Construction Company for said cement, was $968.57; that the price charged the Southern Construction Company was reasonable and fair, and the price that it agreed to pay the plaintiff; that the plaintiff had delivered the full amount of cement to the Southern Construction Company at the price agreed upon, to make up the amount of its claim, namely, $968.57; whereupon the plaintiff offered in evidence the papers in this case, showing the attachment, the Marshal's Return, the proof of pub-
54 lication against the Southern Construction Company, whereupon the claimant, through its attorney, stated that it raised no question at all about the validity of the plaintiff's claim, and that there is no issue between the claimant and the plaintiff on that point.

The plaintiff, through his counsel, then offered in evidence a duly certified copy of the charter of the Southern Construction Company, stating on its face that said charter was recorded October 9, 1905, in one of the charter record books of Baltimore City, and that J. Hurst Purnell, Englebert C. Lawrence, Warfield Ward, Walter S. Brinkmann and Henry H. Hubner are the incorporators; that said Southern Construction Company is a corporation formed as authorized by the provisions of Art. 23, Title "Corporations" Sec. 23, of the Maryland Code of Public and General Laws, 1904. And that said Southern Construction Company will be managed by five directors for the first year, namely, the five incorporators above mentioned.

Whereupon counsel for the plaintiff stated that he would offer in evidence the public and general laws of the state of Maryland, under which the defendant the Southern Construction Company was incorporated, and certain particular sections thereof, unless the same would be judicially taken notice of by the Court; whereupon the Court stated that such laws were of the character of which the court would take judicial notice.

55 The plaintiff through its attorney, then called the attention of the Court to the exceptions taken by the plaintiff to the admission of evidence in the course of the trial, and to the evidence admitted subject to exceptions taken by the plaintiff, whereupon the Court ruled that all said evidence should be admitted, and that the plaintiff should be allowed all the exceptions taken by him, through his attorney, and plaintiff then announced his case as closed.

The plaintiff, through his attorney, then submitted and asked the court to grant, the following prayers:

Whereupon the plaintiff on the foregoing, which contains all the evidence taken in the case, submitted, and requested the Court to grant, the following prayers:

"1. That there is no proof of authority from or execution of an

assignment to the intervenor on behalf of, The Southern Construction Company.

2. That there is no sufficient proof of authority to accept or of an acceptance of an order or assignment by The Southern Construction Company.

3. That there is no evidence of a consideration sufficient to support an assignment or order to the intervenor.

4. That there is no sufficient proof of an acceptance of any assignment, or order in favor of the intervenor by The Southern Construction Company.

5. That the evidence shows that the debt attempted to be
56 secured is a primary debt of one Purnell, and that the Southern Construction Company have no power or authority to secure such a debt, and any order or assignment, if given to secure the same would be invalid.

6. That there is no sufficient proof of custom to vary the ordinary rules in regard to the execution of obligations of corporation.

7. That there is no evidence of an order or assignment to secure a renewal note or notes, and that the obligation originally alleged to be secured has been paid.

8. That there is no evidence in this case of any valid assignment in favor of the intervenor as against the plaintiff in this cause.

9. The jury is instructed that the only evidence in this case of any consideration on the part of the intervenor that would support an assignment is the evidence in regard to the loan for ($2,000), Two Thousand Dollars, and the note for said amount offered in evidence as the note of the Southern Construction Company, and that the evidence offered by the said intervenor shows that the amount of said loan and note was paid by the Thompson-Starrett Company to the said intervenor and that said intervenor thereafter had no right to claim or detain further moneys received from the Thompson-Starrett Company as against creditors of the Southern Construction Company, and the verdict must therefore be for the plaintiff in this cause."

The Court rejected each and all of said prayers, to the rejection of each of which said prayers plaintiff then and there, through his attorney, duly excepted and such exception was duly allowed
57 by the Court, and duly noted on its minutes.

Whereupon the claimant, The National Metropolitan Bank, upon the foregoing which contains all the evidence taken in the case, prayed the Court to direct the jury to return a verdict in favor of the claimant for the full amount of the money attached by plaintiff, and paid into the registry of the Court, namely $1029.60, which said prayer was granted by the Court, and to the granting of which said prayer the plaintiff, by his attorney, then and there excepted, and said exception was allowed by the Court, and duly noted on its minutes.

The Court in granting the prayer of the claimant, The National Metropolitan Bank, delivered the following opinion: "The COURT: It is contended first that there was no consideration for this assignment, because, after they had loaned this $2,000, there had been a

large amount of money paid into the hands of the Bank by the Thompson-Starrett Company. This assignment was not for any specific sum, but was for all moneys, and all moneys went through the hands of the bank, and whilst this money was going through the hands of the bank, they were receiving it, but they were turning it over to the Southern Construction Company, still holding the note of the Southern Construction Company, therefore, they were simply keeping alive the loan that they had made, and giving them credit by enlarging the time of the payment of this note by the various renewals. The thing is done every day in the world at the bank. It was then curtailed to $800. In the meantime one of the last re-

58 newals of that note, the bank contending—one with any knowledge of the national banking system knows that they do not want dead paper in their hands if they can help it; one of the first things the bank examiner inquires about is why is this overdue paper here? To avoid that they took the note of Mr. Purnell, whose personal indorsement they already have, as also that of Mr. Ward. They take his individual note, as he describes as the note to collaterally secure that note of his, this Southern Construction Company note. I was a little surprised when that was brought out yesterday, the note was offered in evidence, and when I look at that Southern Construction Company note there is no assignment of it. The note is payable to the bank, as I recall it, and indorsed by these gentlemen and though Mr. Purnell describes himself as handing over as collateral security this Southern Construction Company note payable to the national bank, his description amounts to nothing because it has not even been indorsed by the bank over to him, which would have then brought up the question as to whether or not there had been in other words, a novation. They have not indorsed it. He has no authority or control over that note whatever, and especially in view of the testimony that it has never been out of the possession of the bank. So it seems to me to be simply unanswerable. How are you going to get rid of it? If that were true, how could Mr. Purnell bring a suit on that note in a law court? He could not do it. He is not the endorser, and from the evidence in this case it never was intended to be assigned by the bank to Mr. Purnell. There-

59 fore, it is unanswerable, it seems to me, that no matter what their effort has been to keep the paper alive on their books, there is no contradictory testimony here whatever about it, and consequently there is absolutely nothing to go to the jury.

Yet, when this note was brought out, it seemed to me that if there were an assignment of that note to Purnell by the bank then there might be a novation, and there might be a question to go to the jury because, when they spoke of taking that as collateral security for the note Purnell gave, how could they take it as collateral security unless they assigned it over to Purnell and then he assigned it back to the bank for purposes of collateral security? It seems to me it would be putting the case almost in an absurd position, and consequently it seems to me that throws conclusive light on this subject. But be that as it may, the simple transaction is that the Southern Construction Company was to receive loans from the national bank, and in payment of that, to secure that, not only a note was given, but it

likewise was to receive the money, and they paid the money over to the Southern Construction Company, enlarging, not taking any more responsibility than they had at the very inception, but giving the opportunity to the Southern Construction Company to pay its creditors by getting money from the Thompson-Starrett Company right straight along to the extent of ten or twelve thousand dollars. There is not a scintilla of a question of fraud in this case. It is always easy to say that this thing or that thing was done, but until some evidence of fraud is offered no jury has the right to guess, and in this transaction there does not seem to me to be the scintilla of fraud,
60 not even a suggestion of it, and consequently, unless there is something in the law points that Mr. Brown made, which of course, he has the right to reserve and take to the Court of Appeals, there is nothing for the jury to do in this case but to find for the claimant."

The plaintiff, through his attorney, then exhibited to the Court, the note of the Southern Construction Company for $1200, and called the attention of the Court to the fact that it would not have to be indorsed by the bank to transfer title to it, but that it was transferable by delivery—whereupon the Court stated that counsel for the claimant had stated to the Court, that said note was made payable to the claimant, the National Metropolitan Bank. Counsel for the claimant then stated that he had made said statement inadvertently; but the jury then being in the act of rendering their verdict, the Court said that it would let its order directing a verdict for the claimant stand.

All the exceptions hereinbefore referred to were taken at the time when the rulings of the Court were made, and were noted on the minutes of the Court as they were severally taken, and the plaintiff prays the Court to sign and seal this its bill of exceptions to have the same force and effect as if the rulings, and exceptions thereto, herein contained were set out in separate bills of exception, which is accordingly done, this First day of March, 1910, *nunc pro tunc*.

HARRY M. CLABAUGH,
Chief Justice.

61 The foregoing bill of exceptions is satisfactory to us.

PERCIVAL M. BROWN,
Attorney for Plaintiff.
RALSTON, SIDDONS & RICHARDSON,
WALTER D. DAVIDGE,
Attorneys for the Claimant,
The National Metropolitan Bank.

Memorandum.

Time to file record in appellate court extended to March 23, 1910, inclusive.

Directions to Clerk for Preparation of Transcript of Record.

Filed Mar. 2, 1910.

In the Supreme Court of the District of Columbia.

Law. No. 48775.

S. DANA LINCOLN
vs.
SOUTHERN CONSTRUCTION CO.

The Clerk on making up the transcript of record on appeal in this case, will include therein:

1. Declaration, particulars of demand, affidavit, rule to plead, note of filing the undertaking in attachment and the approval thereof, summons to the defendant returned "not to be found," and memorandum of the issue of order of publication against the defendant.

62 2. Memoranda of issue of writ of attachment, February 6, 1907, and of Marshal's return thereon.

3. Answer of the Thompson-Starrett Company, filed March 12, 1907.

4. Joinder of issue, filed April 23, 1907.

5. Memoranda of note of issue and notice of trial.

6. Memoranda of payment into the Registry of the Court by the Thompson-Starrett Company of $1029.60.

7. Petition and amended petition of intervention filed by the National Metropolitan Bank, November 4, 1909.

9. Memoranda of verdict.

10. Memoranda of judgment.

11. Memoranda of appeal, filing of appeal bond and citation to appellee.

12. Bill of exceptions.

13. Dates when above papers filed.

PERCIVAL M. BROWN,
Attorney for Plaintiff.

MARCH 1ST, 1910.

Service of a copy of the foregoing designation of record in the above case is this First day of March, 1910, hereby acknowledged.

RALSTON, SIDDONS & RICHARDSON,
Attorneys for National Metropolitan Bank, Appellee.

63 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to

62, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48775 at Law, wherein S. Dana Lincoln, trading as National Mortar Company, a corporation, et al., are Plaintiffs and The Southern Construction Company, a corporation is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 21st day of March, A. D. 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2139. S. Dana Lincoln, trading as National Mortar Company, a corporation, appellant, vs. The National Metropolitan Bank, intervenor. Court of Appeals, District of Columbia. Filed Mar. 22, 1910. Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1910.

No. 2139.

S. DANA LINCOLN, TRADING AS THE NATIONAL MORTAR COMPANY, APPELLANT,

vs.

THE NATIONAL METROPOLITAN BANK, A CORPORATION, INTERVENOR, APPELLEE.

BRIEF FOR APPELLANT.

PERCIVAL M. BROWN,
WALTER B. GUY,
Attorneys for Appellant.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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vs.

THE NATIONAL METROPOLITAN BANK, A CORPORATION, INTERVENOR, APPELLEE.

BRIEF FOR APPELLANT.

I.

Statement of Facts.

On September 11, 1906, the appellant brought suit against The Southern Construction Company, defendant in a certain law cause pending in the Supreme Court of the District of Columbia, known as law number 48,775, to recover the sum of $968.57, with interest from the second day of June, 1906. Affidavits as required by law in attachment proceedings were filed with the declaration, as was also the undertaking required by law, and on February 6, 1907, a writ of attachment was issued and returned by the marshal "attached credits property of the defendant in the hands of The Thompson-Starrett Company, garnishee," and said garnishee in its answer (Rec., pp. 3–6) admitted that it had in its hands to the

credit of the defendant in said suit the sum of $1,029.60, and further set up the fact that said fund is claimed by the receiver for The Southern Construction Company, one George R. Wills, and also by one J. Hurst Purnell, and by The National Metropolitan Bank, and that on account of said conflicting claims that said garnishee does not know to whom said money is due and payable. Thereafter, by authority of the court, the said garnishee paid the sum of $1,029.60 into the registry of the court.

The appellant on April 23, 1907, joined issue with said garnishee on its answer, and on September 23, 1908, filed a note of issue and notice of trial which caused said case to be calendared for hearing. A day or two before the case was first called for trial, the appellee, The National Metropolitan Bank, filed its intervening petition (Rec., pp. 7 and 8), claiming said fund of $1,029.60, and on November 4, 1909, the appellee filed its amended petition of intervention (Rec., pp. 9 and 10), claiming said fund by virtue of an alleged order, not set out in said petition, by which said petition it is alleged that the garnishee was directed by the defendant, The Southern Construction Company, to pay over to said intervening petitioner all payments that might become due from said garnishee to said defendant, The Southern Construction Company, and said intervening petitioner, now the appellee, alleges that said order was accepted by said garnishee. No other alleged claimant of said fund intervened in said law cause filed by the appellant against The Southern Construction Company, and no appearance was made in said law cause on behalf of the said defendant, The Southern Construction Company, although through its officers it had actual knowledge of said suit, and service by publication against said defendant had been duly made. Under the pleadings therefore, and the Code of Law in force in the District of Columbia, an issue was made between the appellant as plaintiff in said law cause and The

National Metropolitan Bank, the intervenor or claimant in said cause, now the appellee, and said issue was tried on the evidence presented in the bill of exceptions set out in the record. At the close of said trial the court rejected all the prayers of the appellant, and directed the jury, in accordance with the prayer of the appellee, to return a verdict in favor of The National Metropolitan Bank, the intervenor or claimant in said cause, now the appellee, for the full amount of the money paid into the registry of the court by said garnishee, namely, $1,029.60. To the action of the court in refusing to strike out, on motion of the appellant, the intervening petitions of said National Metropolitan Bank, and in admitting certain evidence offered by the appellee, and in rejecting the prayers of the appellant, and in granting the prayer of the appellee to direct a verdict in its favor, the appellant duly excepted and said exceptions were duly allowed by the court and are set forth at length in the bill of exceptions in the record in this case.

II.

Assignment of Errors.

1. The court erred in overruling the demurrer and motion of the plaintiff to strike from the record the intervening petition and amended intervening petition of The National Metropolitan Bank (Rec., pp. 12 and 14).

2. The court erred in admitting in evidence the paper writing, dated Baltimore, February 17, 1906, relied upon by the appellee as an assignment or order from the defendant, The Southern Construction Company (Rec., pp. 15–17).

3. The court erred in admitting in evidence the promissory note of The Southern Construction Company for $1,200, dated August 14, 1906 (Rec., pp. 18–19).

4. The court erred in admitting self-serving declarations of witnesses to prove their authority to sign contracts and papers on behalf of The Southern Construction Company and to prove the customs of the company (Rec., pp. 15, 16, 17, 25 and 26).

5. The court erred in rejecting the prayers of the appellant numbered 1 to 9, both inclusive (Rec., pp. 29–30).

6. The court erred in granting the prayer of the appellee, and in directing a verdict in accordance therewith in favor of the appellee, The National Metropolitan Bank, for the money attached by the appellant, and paid into the registry of the court, namely, $1,029.60 (Rec., pp. 30–32).

Points and Authorities.

I. The first point to be discussed is that comprehended in the first assignment of error. This involves the question whether or not the intervening claimant in attachment proceedings is required to set out his claim with sufficient fullness to apprise the plaintiff of the nature and character of the claim on which he will have to join issue, so as to give him an opportunity to prepare his defense to said claim, instead of requiring the plaintiff at the trial table without opportunity for investigation or to obtain evidence to meet a claim based upon matters of fact not disclosed by the pleading.

This cause was calendared for trial on September 23, 1908. The first intervening petition of claimant was not filed until October 27, 1909, a day or two before the case was first called for trial, and at said time the plaintiff had no notice of the fact that said intervening petition had been filed; thereafter and before a trial of said case was actually had, on November 4, 1909, the amended petition of intervention was filed by the claimant (Rec., p. 9).

On the ground that the petition and amended petition of intervention filed by the appellee are so vague and

indefinite that they fail to give the appellant any proper information in regard to the claim of said intervenor such as would enable the appellant to make a proper defense thereto, the appellant filed his demurrer to said petition and amended petition of intervention, and assigned among other specific reasons for the insufficiency of said intervening petition that they did not set out.—

(*a*) Any consideration for the alleged assignment;

(*b*) Or any copy of the order referred to or copy of an agreement, if any existed, or any sufficient pleading to advise the plaintiff of the nature or character of said order or agreement;

(*c*) Or any copy or sufficient pleading of the notes referred to in said petition and amended petition of intervention, so as to enable the plaintiff to know who were the parties thereto, or to inquire into the matter whether the second note referred to was made by the same parties as the first note, and was a proper substitution of securities.

On account of the silence in appellee's pleading and the ignorance of the appellant in regard to said matters, referred to in subdivisions *a*, *b*, and *c*, appellant knew nothing about them until at the trial table; appellant was deprived of all opportunity to investigate or make any defense in regard to said matters other than by making such legal objections as might on the spur of the moment be raised to the admission of evidence.

The appellant calls particular attention to the novation hereinafter discussed arising out of the substitution of the personal note of one J. Hurst Purnell for the note of The Southern Construction Company on which the intervenor bases its claim, which matter was disclosed for the first time at the trial table, thus depriving the appellant of any opportunity of making the defense proper on such state of facts, other than by such means as could be availed of at the trial table.

The appellant submits that this character of pleading is insufficient and that if permitted it will deprive the opposite party of any reasonable opportunity to make a full defense to claims set up in this manner.

The principle above contended for is believed to be supported in the following references:

> "One who claims to be a foreign assignee of a non-resident defendant in an attachment proceeding has the right to intervene therein in order to protect his rights, but his petition for leave to intervene should set out the deed of assignment under which he claims with sufficient particularity of statement to enable the court to determine whether or not upon its face the deed is a valid instrument against the attaching creditors in the jurisdiction in which the attachment proceedings are pending."
>
> Matthai *vs.* Conway, 2 D. C. Appeals, 45.
> Daniels *vs.* Solomon, 11 Appeals D. C., 171.

Although the requirements necessary in the plea of innocent purchaser for value without notice may not be strictly applied to the intervening petition of the appellee, yet, nevertheless, it is submitted that a petition of intervention can not be devoid of all certainty in regard to specific matters which create the claim on account of which the intervening petition is filed. The same reasons which require certainty in the plea of innocent purchaser for value without notice, and certainty in all pleadings, would seem to apply at least to some extent to an intervening petition in attachment.

In Wagonhurst *vs.* Vineland, 20 App. D. C., 96, the court said:

> "A party setting up and relying upon the application of the principle of innocent purchaser for value without notice, whether as ground for relief or as matter of defense in order to prevent fraud and collusion, and that the adverse party may

> have a fair opportunity to meet and repel the claim if it be unfounded in fact, must state in his pleading the deed or assignment under which he makes claim, the date and the parties thereto; that the vendor or assignor was entitled, and rightfully conveyed or assigned; the consideration must be stated, with a definite averment that it was bona fide and truly paid independently of the recital in the deed or assignment. Notice must be denied previous to and down to the time of paying the money and the delivery of the deed or assignment, and *the circumstances of the transaction must be fully and fairly stated.*"

Appellant contends that the intervening and amended intervening petitions in this case were devoid of all reasonable certainty, and that in the statement of the claim all essential elements were so vaguely referred to as to be effectually concealed from the appellant until they were brought out at the trial table.

It is further urged that said petition and amended petition of intervention were defective in that they did not state that the claimant had no other fund out of which it might obtain satisfaction, and as a matter of fact although not stated in the petition, the evidence discloses that they did take the individual note of one J. Hurst Purnell in primary satisfaction of their alleged claim.

This court in speaking of a judgment creditor's petition of intervention, in Daniels *vs.* Solomon, 11 Appeals, D. C., 171, said:

> "It is further urged that the petition of intervention is fatally defective in that it does not sufficiently appear from its allegations that the defendants in attachment had any other property upon which the intervenors might have levied their execution and obtained complete satisfaction. Had this objection been taken by demurrer and sustained there would be no error in the dismissal of the petition."

II. The second assignment of error raises the question whether or not the letter of February 17, 1906, addressed to The Thompson-Starrett Company, signed by The Southern Construction Company, appearing in the record at the top of page 15, and admitted in evidence (Rec., p. 17), was an assignment or irrevocable and unconditional order, transferring whatever might become due from The Thompson-Starrett Company to The Southern Construction Company, to the intervenor, The National Metropolitan Bank.

Unless the well-known rules laid down by the Supreme Court of the United States in regard to assignments and orders of this character mean something different from what the words used by that court would ordinarily be taken to mean, it is submitted that the paper in this case can not operate as an assignment or even to give a lien of any character to the intervening claimant, the appellee. There are some State decisions which seem to hold practically any kind of an intimation to pay money to another to be a valid order or assignment, but these decisions have not been understood at the bar of this District to lay down the law for this District, and unless the care that has been observed here in drawing orders and assignments is entirely unnecessary and founded on a mistaken conception of what the Supreme Court of the United States has said are essential elements of a valid assignment or order, the paper writing relied on in this case as an assignment or order can not avail the intervenor.

In Christmas *vs.* Russel's Ex'rs., 14 Wall., p. 84; Co-op. Ed. Book 20, page 764, the court says:

> "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is

> manifested. Such an intent *and its execution* are indispensable. The assignor must not retain any control over the fund—no authority to collect or any power of revocation. If he do it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay and is compellable to do so though forbidden by the assignor. Where the transfer is of the character described the fund holder is bound from the time of notice."

This is the leading case in the Supreme Court, and it is submitted that the doctrine here laid down has been applied from time to time in the different circumstances of the various cases that have been passed upon by the Supreme Court since the decision in Christmas *vs.* Russell's Ex'rs.

Tested by the rules above laid down, the paper writing relied upon in this case as an assignment or order is insufficient, it is submitted, if words are to be taken in their ordinary significance. In the paper writing relied on by the intervenor there are no *words of transfer*, there is no *direction to pay*, and there is no order to pay, and the mere license or authority to pay, it is submitted, could have been revoked at any time by The Southern Construction Company, unless the mere words of license in the letter of The Southern Construction Company can be construed to mean something different from what these words ordinarily imply.

The letter of The Southern Construction Company does not direct or order any transfer. It is idle to argue the question that the paper does not execute such an intent.

It may be or may not be that the bank thought that it was getting a valid assignment or order, or that through carelessness or its willingness to take a risk, it made a loan to The Southern Construction Company without legally securing it. It can not without causing

serious disorder in other cases ask now to have the language of this letter construed from its standpoint and have a mere license or authority held to be equivalent to a direct order or transfer.

It is common in every day practice to give a mere license or authority in the language of the letter relied upon by the appellee as an assignment and to revoke the same at any time.

If these mere authorizations are to be considered as irrevocable and binding assignments, greater care will have to be exercised, it is submitted, in giving such authorizations than is now customary.

If we interpret the paper writing relied upon by the claimant in and by the light of the rules laid down by the Supreme Court of the United States or in the light of the conduct of the parties themselves we find that practically just such control was exercised over this fund by The Southern Construction Company as the Supreme Court has held to be fatal to the character of an order or assignment.

The evidence in this case shows that after the execution of this paper writing relied upon by the appellee as an assignment or order, The Southern Construction Company got all the money notwithstanding the assignment. The evidence (Rec., p. 28) in the cross-examination of J. Hurst Purnell, secretary and treasurer of The Southern Construction Company, states that in all instances but one (and further on the record shows that that one instance was the last payment by The Thompson-Starrett Company) that The Southern Construction Company got all the money. This witness said (Rec., p. 28), and his statement is nowhere contradicted—

> "in all instances except one the bank gave The Southern Construction Company credit for the full amount of these checks until August 10, 1908, the time of the last check for $885.00, when The

> Southern Construction Company asked the bank to renew the note for $2,000 and the bank refused to do this, but said that it would take a new note for $1,200 and thus the $2,000 note was reduced to $1,200."

The witness was asked what authority he had to tell the bank how to apply the money received on these checks from The Thompson-Starrett Company, and replied—

> "that when the bank notified them that they had received a check for work which The Southern Construction Company had done the previous month, Mr. Ward and the witness came over to see the bank and asked it to continue the loan for $2,000 and to let them have the check, and at their request the bank would let them have the check."

They did not after the date of the letter relied upon by the claimant get any money from The Thompson-Starrett Company direct, but they got it all, except the last payment, indirectly from the bank.

The last payment of $885 which the appellee received from The Thompson-Starrett Company could very well have been kept by it under the unrevoked authority of the letter of February 17, 1906, or as a set-off relied upon by the appellee, without there being any valid order or assignment to the appellee. What would have happened, however, if the bank had refused to give The Southern Construction Company the other payments? Suppose The Southern Construction Company had revoked the mere authorization which it had given to The Thompson-Starrett Company in the letter of February 17, 1906. Can it be said that The Thompson-Starrett Company would not have been bound to take notice of such revocation? If a mere authorization to pay is sufficient to make a binding and irrevocable order or assignment, then The

Thompson-Starrett Company would not have been obliged to take notice of a revocation after having once received proper notice of the authorization. If a mere authorization is, however, what the words imply and what it is generally and practically considered to mean, then The Southern Construction Company could have revoked the authority and have gotten the money anyway.

The law is supposed to have some certainty about it. Mere authorizations of the character of the letter of February 17, 1906, relied upon by the claimant, which can be worked either way and interpreted by the parties to have more or less effect as their interests may incline, are not favored by the law, and it is respectfully submitted do not contain the essential elements of a valid order or assignment. If a paper of this character be allowed to operate, then any fund, however large, may be tied up from the reach of creditors without any substantial inconvenience to the party executing such paper. If a creditor attaches, he may be answered that the money has been assigned. If the assignee will consent the assignee can get the money any way from time to time in the way of renewals of the original loan. Appellant makes this statement without imputing any wrongful intent to the appellee or its agents, but merely to point out the effect in practice that can be made out of such ambiguous instruments or authorizations.

It may be that the appellant is mistaken in his idea of the essential elements that are necessary to a valid assignment or order, but if the language of the paper writing relied upon by the intervenor in this case is sufficient to constitute a valid order or assignment then it is certainly difficult to see wherein it is equivalent to, or complies with, what the Supreme Court of the United States has held to be essential. It certainly does not contain those things which the Supreme Court has said a valid assignment or order should contain.

The third and fourth assignments of error present questions of evidence and corporation law (Rec., pp. 15–19).

Without producing any minutes or stating any corporate action the two witnesses, Warfield Ward and J. Hurst Purnell, who testified that they were president and secretary and treasurer, respectively, assumed to bind the company by their action without any restriction whatever.

The record (p. 29) discloses the fact that The Southern Construction Company was incorporated under the Maryland Code of Public and General Laws of 1904, and that five incorporators and directors were named in their charter in accordance with said law. Paragraph 65 of article 23, Public and General Laws of Maryland, provides as follows:

> "The stock, if any, property and concerns of any corporation for whose creation provision is made in this article shall be managed by such number of trustees, directors, or managers as by its by-laws or charter shall prescribe, said number to be not less than four nor more than twelve, who shall, respectively, be citizens of the United States and a majority of them citizens of this State," etc.

The appellee offered evidence (Rec., p. 16) showing that the board of directors of The Southern Construction Company never authorized the execution of the letter relied on by the appellee.

The question is presented in this case as to how far the requirements of the law that the corporation shall be managed by its directors can be relaxed so as to enable mere officers of a corporation to execute binding contracts, assignments, and transfers of property for the corporation on their own responsibility, and to act, though operating under the name of a corporation, as if they were carrying on an individual business.

The appellant is aware that the earlier rules in regard to the limited authority of the officers of a corporation have been relaxed so as to allow the acts of the officers within the ordinary scope of their duties to be binding on the corporation, yet, nevertheless, some duties must remain for the board of directors. It does not seem to the appellant that there is any authority of any sufficient character disclosed by the evidence in this case to authorize the officers of the company without any action by its board of directors, or any corporate action whatever to borrow money and execute valid transfers of its prospective assets. Certainly without some authority on the part of the corporation it would be dangerous in the extreme to permit a corporation to be bound in such manner.

In Hoyt *vs.* Thompson, 5 New York, 320, Ruggles, Chief Justice, speaks in part as follows:

> "The charter of the Morris Canal and Banking Company is made a part of the bill. By its 3rd section the management of the concerns of the company was vested in fifteen directors, to be selected from the stockholders, and the directors were to choose a president from among themselves. The 8th section gives to the president and directors, or a majority of them, the power to elect all engineers, treasurers, collectors, cashiers, toll men, clerks agents, etc., necessary in their judgment for conducting the affairs of the company."
>
> "But the powers and duties of the president and cashier are not prescribed by the charter; no power is conferred upon them to mortgage, assign, or dispose of the property of the corporation. This is a part of the management of the concerns of the company which is confided expressly to the directors, but not to the president and cashier. In no case has it been held that these officers have the power to do an act like that in question,

without the assent and authority of the directors."

. . . . . .

"A great proportion of the failures and bankruptcies of corporations and of the frauds committed by them upon those who have dealt with them have resulted from the usurpation by their respective offices of the powers which by the charters are intrusted to the directors."

And the court further says that, although in many cases corporations have been held bound by such acts, this has been on the theory that officers have been permitted by the directors to take the entire managements into their own hands, or that the directors have subsequently ratified their acts. There is no proof in this case that the directors authorized these officers of The Southern Construction Company to assume that they were the entire corporation. All that appears in the record are a few self-serving statements made by these officers to justify themselves.

Page, J., concurring with the other members of the court, delivers an individual opinion in which he seems to regard the assignee of a debt due to a corporation as a bona fide purchaser for a valuable consideration, and draws a distinction not concurred in by the opinion of the court delivered by Ruggles, Chief Justice, between the right of the corporation to question the validity of the acts of officers not authorized by its directors as against bona fide purchasers and other parties who do not occupy that position (p. 356).

Counsel for the appellant submits that the view of Ruggles, J., is sound and will have to ultimately prevail. It is easy enough for anyone to take notice of the fact that a corporation has directors and that certain acts require their authority. To allow corporations to be bound by unauthorized acts of officers out of the scope of their ordinary duties can be easily carried so far as to

wreck and destroy corporations, if the parties receiving the benefit of such acts can claim to be bona fide purchasers for value without notice. A careful reading of the opinion in this case will repay one for the time spent on it, since several somewhat vague questions in the law are discussed with great ability.

See, also, Cook on Corporations Vol. 3, Par., 712.

IV.

The prayers of the appellant appear at pages 29 and 30 of the record.

The appellant submits to the court that the evidence disclosed by the record justified the appellant in asking that these prayers be granted and that the refusal of the trial court to grant the same was error.

V.

The sixth assignment of error raises the question whether the court was justified upon the evidence in this case in directing a verdict in favor of the claimant, The National Metropolitan Bank, now appellee. In considering this last assignment of error the appellant calls to the attention of the court the following facts disclosed by the record.

The appellant occupied the position of plaintiff in the issue made between appellant and the appellee in the court below and the burden of proof was on the said appellee as claimant to fully establish his case.

See section 462 of the Code of Laws of the District of Columbia.

Waples on Attachment, 2d ed., par. 794.

There is no sufficient proof in this case of notice to The Thompson-Starrett Company of said letter of February 17, 1906, although it may be inferred that said garnishee had some notice of it from the fact that it

sent checks to the appellee as it was authorized to do. The record contains no evidence, however, *as to when*, if ever, said letter was accepted by The Thompson-Starrett Company. And the record contains no proof that The Thompson-Starrett Company, garnishee, ever promised to pay the appellee in accordance with the authority contained in said letter, and indeed its answer to the writ of garnishment in this case would seem to negative the idea that it ever had made any promise to pay to the appellee, for it distinctly sets up the fact that many claims were made by different parties to the fund in its hands, and that it did not know to whom to pay the fund.

The letter to The Thompson-Starrett Company could not have been accepted on the date of the letter, because it was intended to be sent to The Thompson-Starrett Company for action. *When the word "accepted"* was placed upon the letter is not attempted to be proved. It may as well have been placed on there after the lien of the appellant had attached as prior thereto so far as any evidence appears in this case. There is no evidence of any authority for B. C. Dickinson to have accepted or promised to pay anything on behalf of The Thompson-Starrett Company in the record. There is no evidence to show what the indorsement of B. C. Dickinson was intended to mean. It is not a promise to pay. What probably happened, although there is no evidence in the case, is that said Dickinson forwarded the letter to the main office of The Thompson-Starrett Company in New York, and that said company regarded it as sufficient authority while unrevoked to authorize it to send checks to the appellee. But the word "accepted" might have been written on the letter after the lien of appellant attached.

The only evidence in the case on these points is that of the witness Ghiselli, who testifies (Rec., pp. 16–17),

that he is the paying teller of the Commercial National Bank, and that he knows the signature of B. C. Dickinson, manager of The Thompson-Starrett Company, appearing on said letter of February 17, 1906, relied upon by the claimant as an assignment or order, and an extract from the minutes of The Thompson-Starrett Company (Rec., p. 26), reading as follows:

> "Extract from minutes of regular meeting of the Finance Committee of The Thompson-Starrett Company, held at the office of the company, No. 51 Wall Street, New York City, September 7, 1905, at 12.30 P. M.
>
> On motion duly seconded, it was
>
> *Resolved*, That on and after September 15, 1908, Mr. B. C. Dickinson be and hereby is authorized to sign as manager all checks drawn against the company's account with The Commercial National Bank, Washington, D. C., in place of Mr. H. V. Sandford.
>
> I hereby certify that the above is a true copy.
>
> L. J. MORTON, *Treasurer*. [SEAL.]
>
> Sworn to before me this 14 day of September 05.
>
> CHARLES L. KINGSLEY,
> *Notary Public, N. Y. C.*"

The appellant submits that this is not sufficient evidence of notice to or acceptance by The Thompson-Starrett Company. There is no sufficient proof that Mr. B. C. Dickinson *could* act for The Thompson-Starrett Company in a matter of this kind, nor of what this acceptance meant. Can it be interpreted as a promise to pay?

There is no evidence offered in the case if any consideration moving to The Thompson-Starrett Company in connection with said paper writing relied upon by the appellee as an assignment or order, and as to the appellee it appears (Rec., p. 22), that the letter of February 17, 1906, was not given to the bank at the time when it made the loan, but subsequently thereto.

There can be no escape from the fact that the appellee could not rely upon an acceptance and promise to pay from The Thompson-Starrett Company even if properly proved to have been made by said company, without also proving *that such acceptance and promise took place prior to the attaching of the fund by the appellant.* Such acceptance and promise after the appellant secured a lien by garnishing the fund could not but be subject to the lien acquired by the appellant in attaching, yet the appellee entirely failed to offer any evidence to show a valid acceptance and promise to pay of a valid order prior to the lien which the appellant acquired by attaching the fund in the hands of The Thompson-Starrett Company. The burden of proof being on the appellee to make out its case against the appellant if it relies upon an acceptance it can not be said that it can make good its claim without showing that an acceptance and promise to pay took place prior to the lien acquired by the appellant in the attachment proceeding. The record is barren of any evidence to show *when* said alleged acceptance of The Thompson-Starrett Company took place, *or that any promise to pay was made.* There was thus a plain failure on the part of the appellee to make out this claim, although the burden of proof is upon it.

There is no evidence in this case and there is no claim in the petition or amended petition of intervention of the appellee that there was any agreement to secure the appellee for anything excepting the original $2,000 note, which the evidence in the record shows was paid to the appellee, and that said note was returned by the bank, after being paid, to The Southern Construction Company. Albert Bedford, appellee's note teller, testifies as follows (Rec., p. 21):

> "That the original note of The Southern Construction Company for $2,000 on which the first

> loan was made to The Southern Construction Company by the bank was surrendered to The Southern Construction Company on the renewal thereof, and is not now in the possession of the bank. That Mr. Purnell's indorsement was not on the original note for $2,000 but the indorsement of Mr. Purnell and Mr. Ward is on the $1,200 note."

It would seem clear from the foregoing that the only note or indebtedness which the appellee in its pleadings or in its evidence claimed that The Southern Construction Company agreed to secure by said letter dated February 17, 1906, being said original $2,000 note, was fully paid. There was no claim in the pleadings nor was any evidence offered of any agreement on the part of The Southern Construction Company to secure other loans which the appellee from time to time offered evidence to prove that it made to The Southern Construction Company. There is no claim in the pleading or any evidence offered of any agreement on the part of The Southern Construction Company to secure renewal notes.

Attention is further called to the fact that the evidence offered in this case by the appellee presents a clear case of novation.

It will be remembered that in the dealings between The Southern Construction Company and the appellee after the date of said letter of February 17, 1906, relied upon by the appellee as an assignment or order, that The Thompson-Starrett Company paid to the appellee on account of said letter of February 17, 1906, sums of money aggregating over $11,000 (Rec., pp. 27–28), and that The Southern Construction Company got it all from the bank excepting the last check for $885, which the bank retained when Ward and Purnell gave the bank the note of The Southern Construction Company (Rec.,

p. 28), which said note appears at page 18 of the record and reads as follows:

"NOTE.

$1200.00. WASHINGTON, D. C., *Aug. 14, 1906.*

Sixty days after date we promise to pay to the order of ourselves twelve hundred dollars, at National Metropolitan Bank, Washington, D. C.

SOUTHERN CONSTRUCTION CO.
WARFIELD WARD, *President.*
J. HURST PURNELL, *Sect. Tr.*

Value received.
No. ———.
Due Oct. 15."

Indorsed on the back as follows:

"J. Hurst Purnell, Warfield Ward, Southern Construction Company, J. Hurst Purnell, Sect. Tr., 410 Cont. Bldg., Balto., Md."

It will be seen from an inspection of this note that it was not intended to be indorsed, but to be transferable by delivery. At the trial table, on cross-examination of appellee's note teller, it was disclosed to the appellant for the first time (Rec., p. 21) that the appellee had substituted as a primary obligation for the balance of its loan of $2,000 the individual note of J. Hurst Purnell, who testifies elsewhere in the record that he had been secretary and treasurer of The Southern Construction Company, and that said J. Hurst Purnell gave the said $1,200 note of The Southern Construction Company to the bank as collateral security for his said personal note of $1,200. It is manifest that the bank could not enforce payment on both of said notes for the same debt. It would have to surrender one or the other, and it chose to make the individual note of J. Hurst Purnell the primary liability.

It must therefore have made delivery and passed title

to said $1,200 note of The Southern Construction Company to said J. Hurst Purnell, as a matter of law, before he could put up The Southern Construction Company note as collateral security for his own. This whole transaction is disclosed by the terms of said individual note of J. Hurst Purnell, in which The Southern Construction Company note is offered as collateral security (pp. 22–23 of the Record). One can not see how the bank to suit its own convenience can jump from one of these notes to the other and treat either of them as the primary obligation, when by its own act, as a matter of law, it has made the note of J. Hurst Purnell the primary obligation for its debt. The note teller of the appellee, on page 24 of the record, states that he did not know what had been done by the bank in the way of an effort to collect on said individual note of Purnell, and the appellant offered no evidence to show what it had done in the way of endeavoring to collect on said individual note of Purnell, and there was no way in which the appellant could find out anything about said matter.

The court in its remarks in directing a verdict for the appellee, held that there was no novation in this case, because said $1,200 note of The Southern Construction Company would require the indorsement of the appellee before title could be passed to it. This mistake of the court is obvious on reading the note and the court was inadvertently led to make it by a statement of counsel for the appellee, made, however, inadvertently, to the effect that said $1,200 note was made payable to the appellee, The National Metropolitan Bank, when as a matter of fact the said note was made as one payable to bearer, and was not intended to be indorsed but to be transferred by delivery.

In its intrinsic nature the claim of the appellant is as equitable and just certainly as the claim of the appellee. The appellee has the cement and material of the appel-

lant in its building and the appellant can not be paid for it, appellee claims, because the only money that was naturally available, and out of which the appellant expected his claim would be paid, was assigned to the bank. The bank and the officers of The Southern Construction Company have not acted in this case in opposition to the interests of one another, and the record in this case discloses the fact that both are hostile to the claim of the appellant. The evidence discloses also that the appellee has taken a primary security which it can enforce and make itself whole. If loss should follow anywhere it seems that the officer of The Southern Construction Company who gave the primary security took that risk at the time when he gave it, and if he is really so much the company as the evidence in this case would seem to indicate that he believes he is, it seems that if the loss falls on him, he can not complain that it is other than the natural result of the operations that he has been engaged in.

The burden is on the appellee to make out by clear proof its right to render the suit and claim of the appellant of no avail to him. We submit that the appellee has not done so, and that on this record the appellant is entitled to the fund in the registry of the court.

The appellant respectfully submits that the questions in this case are important, and that to allow the appellee to recover the fund in the registry of the court would give effect to vague and uncertain orders which, to say the least, are liable to a changeable interpretation suiting the convenience of the parties.

Respectfully submitted.

PERCIVAL M. BROWN,
WALTER B. GUY,
Attorneys for Appellant.

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2139.

S. DANA LINCOLN, TRADING AS NATIONAL MORTAR COMPANY, A CORPORATION, APPELLANT,

vs.

THE NATIONAL METROPOLITAN BANK, INTERVENOR, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

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THE NATIONAL METROPOLITAN BANK, INTERVENOR, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

The Case.

This is an appeal from the Supreme Court of the District of Columbia.

September 1, 1906, the appellant, S. Dana Lincoln, instituted in the court below an action in assumpsit against the Southern Construction Company, a corporation, for goods sold and delivered, for which he claimed $968.57 (R., 1-5). At the same time he caused to be issued a writ of attachment which was on February 6, 1907, returned "Attached credits,

property of the defendant, in the hands of the Thompson-Starrett Company, garnishee" (R., 5).

The Thompson-Starrett Company, the garnishee, filed its return on March 12, 1907, in which it answered that on or about the 12th day of December, 1905, it had contracted with the Southern Construction Company that it, the defendant, should furnish and erect all of the fire-proofing required completely to finish the building of the National Metropolitan Bank, then called the National Metropolitan Citizens Bank; that subsequently said defendant failed and defaulted in said work, and said respondent (being under contract to erect said building—R., 14) was obliged to and did complete said work; that after the completion of the work there remained in the hands of the respondent a balance of $1,029.60; that said amount did not belong to the respondent, but, because of conflicting claims thereto, the respondent did not know to whom said money was due; that said amount was claimed by one George R. Willis, who had been appointed by a court of competent jurisdiction of the State of Maryland receiver of said Southern Construction Company's property, who had called upon the respondent to pay over to him any money there might be in its hands due to the Southern Construction Company; that, moreover, the same fund was also claimed by one J. Hurst Purnell by reason of the alleged fact that said Purnell by furnishing labor and materials to the respondent for the benefit of and in order to reduce certain obligations of the Southern Construction Company claimed certain credits, the exact amount of which was unknown to the respondent; that said fund was also claimed by the National Metropolitan Bank for the reason that on or about February 17, 1906, the Southern Construction Company has assigned to the National Metropolitan Bank its right to any payments that might become due to it under said contract (R., 5-6).

April 23, 1907, the plaintiff, appellant, joined issue on the answer of the respondent, the garnishee (R., 7).

June 2, 1908, the respondent paid into the registry of the court below the amount which it admitted in its hands, $1,029.60 (R., 7).

Subsequently and before the trial The National Metropolitan Bank, the appellee, by leave of the court, November 4, 1909, filed an intervening petition, in which it affirmatively set up its claims to the fund, more specifically than they appeared in the answer of the respondent:

> "That it is a corporation, duly incorporated under the laws of the United States and doing business in the District of Columbia.
>
> "2. That heretofore, to wit, on the 17th day of February, 1906, the defendant, Southern Construction Company, gave an order upon the Thompson-Starrett Company, a party herein, directing it to pay over to this intervenor any and all payments as they might become due according to the contract of the Southern Construction Company with the Thompson-Starrett Company, for work to be done on the National Metropolitan Citizens Bank building, and that such order was forthwith duly accepted by the Thompson-Starrett Company, and that such order and acceptance thereof at once communicated to this intervenor, and that, relying upon such order and acceptance, the said bank did, on or about the 19th day of February, 1906, loan to said Southern Construction Company the sum of two thousand (2,000) dollars, taking its note therefor and holding said duly accepted order as collateral. That thereafter, and prior to the filing of the attachment in this case, there became due to the Southern Construction Company by the Thompson-Starrett Company, because of the work upon the building of the intervenor, a large sum, to wit, the sum of twelve hundred (1,200) dollars, which sum, or so much thereof as the Thompson-Starrett Company admits to have been due by it to the Southern Construction Company, has been paid into the registry of this court, attachment having been served herein upon the Thompson-Starrett Company before said payment could be made.
>
> "That at and before the time of the service of said

attachment there was and still is due to the said bank, the intervenor herein, by the Southern Construction Company as balance of the aforementioned loan of two thousand (2,000) dollars, the sum of twelve hundred (1,200) dollars, for which it gave, as a renewal of the aforesaid note for two thousand (2,000) dollars, its note to the National Metropolitan Bank dated August 14, 1906, payable sixty days after date, with interest at the rate of six per centum per annum until paid; the original note of two thousand (2,000) dollars having theretofore been reduced by the payment of interest and eight hundred (800) dollars on account of the principal thereof, out of funds paid to the said intervening bank by the Thompson-Starrett Company, pursuant to and in reliance upon the aforementioned assignment of February 17, 1906.

"Wherefore this intervenor [the appellee] prays: That the moneys now in the registry of this court may be condemned to its use, and directed to be paid over to it, and that it may have such other and further relief as it is entitled to in the premises" (R., 10).

The issues were tried before Mr. Chief Justice Clabaugh and a jury and resulted in a verdict for the bank. Judgment was duly entered thereon, from which the plaintiff appealed (R., 10, 11).

At the trial the claimant, the appellee, proved absolutely without any contradiction whatever the facts as below set forth and then rested. The defendant adduced no testimony whatever even remotely tending in any way to disprove or offset the claim of the bank, the only testimony offered by the appellant going to the proof of his alleged claim against the Southern Construction Company and being hence inadmissible (R., 13-32, 29).

The testimony for the bank was, briefly, to the effect that the Thompson-Starrett Company was the contractor for the erection of the building of the bank, and that it employed the Southern Construction Company to do the fire-proofing

work in the building, for which the Thompson-Starrett Company was to pay a sum agreed upon as the work progressed, so much a month; that the Southern Construction Company, on the strength of this relationship, on February 15, 1906, applied to the bank for a loan of two thousand dollars, for which it agreed to give as collateral security an assignment to the bank of any money that was due or might become due to the Southern Construction Company under the contract between the Southern Construction Company and the Thompson-Starrett Company. The application for the loan is in writing and is set out at page 14 of the record.

On February 17, 1906, two days later, the Southern Construction Company, in writing, by its president and secretary and treasurer, and over its corporate seal, assigned any and all payments, as they might become due under the contract, to the bank. This was duly accepted by the Thompson-Starrett Company (R., 15, 17).

The assignment was then delivered to the bank and, relying upon it, and without any other collateral security, the bank loaned to the Southern Construction Company the sum asked for, taking therefor the note of the Southern Construction Company for that amount, dated February 19, 1906 (R., 18, 20, 22, 25). And thereafter, pursuant to the terms of the assignment, all moneys accruing from the Thompson-Starrett Company to the Southern Construction Company were paid directly to the bank (R., 16, 28). The various payments are set out at pages 27 and 28 of the record.

April 19, 1906, the note was renewed, and again on June 15, for the same amount, with the endorsements of Messrs. Ward and Purnell, president and secretary and treasurer, respectively, of the Southern Construction Company (R., 13, 14, 15, 17, 18, 21, 25).

August 15, 1906, the note was again renewed, being reduced to $1,200, and a new note for that amount, with the

same endorsements, was taken by the bank, which is still due and unpaid (R., 18, 19, 21).

When this last note matured, October 15, in order that overdue paper might not appear on the books of the bank, the transaction was renewed in the following form: Mr. Purnell gave his individual note for the amount due, secured by the above-mentioned note of the Southern Construction Company, as collateral. The note of the Southern Construction Company, however, remained the property of the bank and was never out of its possession. In this manner the note of the Southern Construction Company did not appear on the books of the bank as overdue paper (R., 21, 22, 23, 24). On this last note, the collateral note, interest was paid from time to time down to December 14, 1908 (R., 23). The transaction, however, was one and the same, and only the form was changed, for the purpose above mentioned. Two officers of the bank both testify to this, and their testimony is absolutely uncontradicted.

POINTS.

I.

The Assignment.

One of the points made by the original plaintiff below, the appellant, was that the paper writing of February 17, 1906, was in effect not an assignment. This paper is, indeed, inartificially drawn, and is not the work of a person skilled in the law. It represents, however, just the way one man of business would undertake to assign a right to another, and the language employed, if not technical, is that of the ordinary, every-day, business world.

It should be borne in mind that no particular form of words is necessary to constitute a valid assignment.

The language of the paper is "authorize you to pay over." The appellant will argue that this is insufficient.

The facts are that the Southern Construction Company applied to the bank for the loan and offered to give the bank an assignment of these credits; the bank accepted this proposal, and upon the strength of this assignment, which had been accepted by the debtor, made the loan.

Among the parties to the assignment, no question arises as to its sufficiency. The only question is whether the Southern Construction Company, after the execution and delivery of the assignment, and its acceptance by the debtor, retained the ownership of the credits so that they might be attached by the creditor of the Southern Construction Company. Nor does any question arise here as to the right of the Southern Construction Company to make a valid assignment of these credits, for the claim of Lincoln against the Southern Construction Company accrued after the assignment and the loan had been made. All the parties to the transactions regarded the assignment as complete and effective, and their subsequent action supplied, if need were, any defects there might have been in the paper alone. However, taking the mere paper by itself, our contention is that there is enough in it to constitute a valid assignment, and when we consider the terms of the paper in conjunction with the action of all the parties to the transaction, we think the matter almost too plain for argument.

There are many cases of irregular assignment. For illustration:

"I hereby endorse the within note to J. M. Loudermilk," was held to be a valid assignment.

Loudermilk *vs* Loudermilk, 93 Ga., 443.

In a Minnesota case the writing was:

"STATE OF MINNESOTA,
"*County of Brown, ss:*

"NEW ULM, *March* 1, 1876.

"I, George Braun, do hereby certify and acknowledge that I have, on this first day of March, A. D.

1876, given up all claims I have against John Hauenstein in favor of John B. Karl."

This was held sufficient.

Crone *vs.* Braun, 23 Minn., 239.

"Any binding appropriation of it to a particular use, by any writing whatever, is an assignment, or, what is the same, the transfer of ownership."

Conway *vs.* Cutting, 51 N. H., 407.

Even if the word "authorize" be taken alone, and not to be construed in connection with the action of the parties, even then it would not be construed so narrowly as to be equivalent to a mere permission or license. For instance, in Maryland it is held to impose an absolute duty or obligation.

Com. Public Schools, County Coms. of Alleghany Co., 20 Md., 458.

County Coms. *vs.* Duckett, 20 Md., 477.

Flynn *vs.* The Canton Co., 4 Md., 312.

Marriott's Case, 9 Md., 160.

Pendleton & Harlan's Case, 15 Md., 12.

Magaha *vs.* Hagerstown, 95 Md., 62.

See also:

Brown *vs.* Minneapolis, 47 Minn., 115.

Rankin *vs.* Buckman, 9 Or., 253.

Veazie *vs.* China, 50 Me., 518.

People *vs.* Buffalo, 21 N. Y. Supp., 601.

People *vs.* Sups. of Herkimer, 56 Barb., 452.

People *vs.* Sups. of Otsego, 51 N. Y., 401.

The appellant will cite *Christmas vs. Russell's Ex'rs,* 14 *Wall.,* 69, but that case only goes to the point that an agreement to pay out of a particular fund is not an assignment. That is not the case at bar. The case we have to do with is rather more like the case of *Granite Company vs. Chandler,* 4 *Mackey,* 32, where it was held by the old general term of

the court below that an assignment of a claim "to the extent of $10,600" was not an assignment of so much money to be paid out of the claim when recovered, but an assignment of the claim itself to that extent, so that the assignee was entitled to interest on the whole $10,600.

II.

Renewals of the Note and Novation.

Admitting the validity of the assignment, says the appellant, even then it was intended to be security for the original note, of $2,000, and was not for any other note, even representing the same loan. Had there been any other loan, there might be something in this suggestion, but as a matter of fact, however, and the evidence is uncontradicted, there was only one loan made and the subsequent notes were merely renewals of the original note and represented the one and the same loan, the interest, and, in one case, a curtail, being paid. This is true also as to the last note which was in form a collateral note.

The assignment was general in its terms and did not mention the purpose for which the credits were assigned to the bank (R., 15). The letter of application for the loan, however, shows that it was *the loan* that was to be secured and not any particular note (R., 14). The notes were the mere evidence of the loan or the debt and they might be multiplied at will without in any way affecting the assignment or the security. Nothing short of the satisfaction of the debt to the bank could satisfy the purpose of the assignment.

The reason for taking the collateral note at the time of the last renewal, rather than the usual form of note, is fully explained by the uncontradicted testimony of two officers of the bank that it was simply to carry the note without having it appear on the books of the bank as overdue paper.

III.

The Power of the Officers of the Southern Construction Company to Execute the Assignment.

The appellant contends that the president and secretary and treasurer of the Southern Construction Company had, as such, no power to borrow the money from the bank for the use of the corporate business and to execute and deliver the assignment for the loan. As clear as it is that they had, as such, that power, it is not necessary to argue that question. At that time the company consisted of only three stockholders and three directors, Mr. Ward, the president; Mr. Purnell, the secretary and treasurer, and Mr. Hubner, a member of the Baltimore bar, who acted as counsel of the company. Both Mr. Ward and Mr. Purnell signed the assignment. Mr. Hubner was called as a witness and testified that the business of the company was conducted entirely by those officers, that he knew that, and that he approved of their manner of executing contracts and transacting the business. So that, in conclusion, the acts of these officers, now complained of, had the approval of *all* the directors and *all* the stockholders (R., 15, 16, 17, 25, 26).

As a matter of abundant precaution it was uncontradictedly established that this was the custom of the company from the date of its inception, but this was unnecessary.

IV.

As to the Sufficiency of the Intervening Petition.

The amended intervening petition was filed, with leave of the court, on November 4, 1909. The case came on for trial on January 6, 1910 (R., 9, 12). We mention these dates because it was intimated by the appellant that he did not have sufficient time to become fully advised as to the allegations.

The objections of the appellant to the petition are threefold: (*a*) That it did not set out a consideration; (*b*) or any copy of the order or agreement referred to or any sufficient pleading to advise the plaintiff of the nature or character of the order or agreement; (*c*) or any copy or sufficient pleading of the notes referred to.

Let us examine these objections in their order.

(*a*) The petition alleges:

> "That heretofore, to wit, on the 17th day of February, 1906, the defendant, Southern Construction Company, gave an order upon the Thompson-Starrett Company a party herein, directing it to pay over to this intervenor any and all payments as they might become due according to the contract of the Southern Construction Company with the Thompson-Starrett Company, for work to be done on the National Metropolitan Citizens Bank Building, and that such order was forthwith duly accepted by the Thompson-Starrett Company, and that such order and acceptance thereof at once communicated to this intervenor, and that, relying upon such order and acceptance, the said bank did, on or about the 19th day of February, 1906, loan to said Southern Construction Company the sum of two thousand ($2,000) dollars, taking its note therefor and holding said duly accepted order as collateral" (R., 9).

We submit that it would be well-nigh impossible to set out the consideration more fully than it is herein stated. The consideration moving to the Southern Construction Company and for which it gave the assignment to the bank was the loan which the bank made to it.

(*b*) The intervening petition did not set out the assignment verbatim, for that would be bad pleading and in contravention of the ancient rule of pleading, which requies documents to be pleaded according to their legal effect.

(*c*) The petition did not set forth a copy of the notes referred to for the same reasons. The notes are described as fully as it is possible in pleading at law to describe them.

The petition goes on to state:

> "That at and before the time of the service of said attachment there was and still is due to the said bank, the intervenor herein, by the Southern Construction Company as balance of the aforementioned loan of two thousand ($2,000) dollars, the sum of twelve hundred ($1,200) dollars, for which it gave, as a renewal of the aforesaid note for two thousand ($2,000) dollars, its note to the National Metropolitan Bank, dated August 14, 1906, payable sixty days after date, with interest at the rate of six per centum per annum until paid; the original note of two thousand ($2,000) dollars having theretofore been reduced by the payment of interest and eight hundred ($800) dollars on account of the principal thereof, out of funds paid to the said intervening bank by the Thompson-Starrett Company, pursuant to and in reliance upon the aforementioned assignment of February 17, 1906" (R., 9-10).

But the notes are not the essential part of the transaction; it is the loan which is the important thing; it was the loan for which the assignment was given; it was the loan for which the notes were delivered; and it is the loan which is now due and is the basis of the claim of the bank.

Respectfully submitted,

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